RECORD AND BRIEFS

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In the Supreme Court of the United States

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
VERNON MADISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Capital Case)

Over thirty years ago, Vernon Madison shot and killed a police officer. Last year, after his execution was set, Madison filed a petition in state court challenging his competency to be executed. Madison's own expert testified that Madison understands "the meaning of a death sentence," "the nature of the pending proceeding," "what he was tried for," and "that he's being executed." But Madison's expert also concluded that Madison could not remember committing the murder. The state court's own appointed expert testified that Madison could remember details of his life, including around the time of the murder, and "was able to discuss his case in a very accurate manner." The state court held that Madison was competent to be executed.

After a federal district court denied Madison's habeas petition, the Eleventh Circuit stayed his execution. Four members of this Court voted to vacate the stay, but it was left undisturbed by an equally divided Court. Later, in a divided opinion, the Eleventh Circuit held that the state court was "patently unreasonable" when it found Madison competent to be executed because he is "a man with no memory of what he did wrong."

This petition raises two questions:

(1) Do this Court's precedents clearly establish that a prisoner is incompetent to be executed for a murder because he does not remember or acknowledge committing it?

(2) Was the state court objectively unreasonable in concluding that Madison was competent to be executed?

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The district court's order denying Madison's habeas petition and motion for stay of execution is unreported and reprinted in the appendix at 38a-66a. The Eleventh Circuit's opinion reversing is reported at 851 F.3d 1173 (CA11 2014), and reprinted in the appendix at 1a-37a. The state court's order determining that Madison is competent is unreported and reprinted in the appendix at 67a-81a.

STATEMENT REGARDING JURISDICTION

Jurisdiction is proper. *See* 28 U.S.C. § 1254 (1). The district court had jurisdiction to consider the habeas petition. 28 U.S.C. § 2254 (d). The Eleventh Circuit issued the opinion under review on March 15, 2017. App. 1a. The Commissioner filed a timely application for rehearing, which the Eleventh Circuit denied on May 4, 2017. *See* App. 82a-83a. This petition is timely filed within 90 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

The pertinent section of the Anti-Terrorism and Effective Death Penalty Act states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d).

STATEMENT OF THE CASE

In April of 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her 11-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, sneaked behind the police car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses watched Madison murder Officer Schulte and attempt to murder his girlfriend. *Id.*

Madison was charged with capital murder because he had murdered an on-duty police officer. *See* Ala. Code § 13A–5–40(a)(5). He was tried and convicted three times because of errors in his first and second trials. *See Madison v. State*, 545 So.2d 94, 99 (Ala.Crim.App.1987); *Madison v. State*, 620 So.2d 62, 63 (Ala.Crim.App. 1992); *Madison v. State*, 718 So.2d 90 (Ala.Crim.App. 1997). Madison denied committing the murder before his first two trials and claimed self-defense at his third. After each trial, Madison was sentenced to death in light of his history of violent crime. His third conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *id.* at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So. 2d 104, 108 (Ala. 1998). His appeals were denied on direct review, and, after an evidentiary hearing in federal court, he exhausted his state postconviction and federal habeas claims. *See Madison v. Thomas*, 135 S. Ct. 1562 (2015).

After the Attorney General asked the Alabama Supreme Court to set an execution date, Madison filed a state-court petition claiming he was incompetent to be executed because, among other things, he could not remember murdering Officer Schulte. Doc. 8-1.

A. The state court holds a competency hearing.

This Court has held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). But it has left discretion to lower courts to determine how to meet that standard. Although a lower court cannot "foreclose[]" an inmate "from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution," this Court has

not "attempt[ed] to set down a rule governing all competency determinations." *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). The Court has also held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.* at 959.

The state court set a hearing to evaluate Madison's claims of incompetence and gave Madison the opportunity to submit evidence, including from his own psychological expert. Doc. 8-2 at 4. Before the hearing, Madison was evaluated by Dr. John Goff (a neuropsychologist retained by Madison) and Dr. Karl Kirkland (a court-appointed psychologist). At the hearing, the state court admitted Dr. Goff's report, Dr. Kirkland's report, and Madison's medical records. *Id.* at 5-9. The state court also heard testimony from Dr. Goff, Dr. Kirkland, and the warden of the prison where Madison was housed.

1. Dr. Goff's testimony. Dr. Goff testified that Madison experienced cognitive decline after suffering a stroke. Nonetheless, Dr. Goff concluded that Madison understands "the meaning of a death sentence." Doc 8-3, Tab R-14 at 7 (expert report). Dr. Goff further concluded that Madison said his crime "must have been a murder," that he had three trials, and that he felt his "conviction was unjust." *Id.* But, according to Dr. Goff, Madison could not remember the name of the victim, and he did not think he killed anyone because he purportedly "never went around killing folks." *Id.*

Dr. Goff concluded that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for." Doc. 8-3,

Tab R-14 at 8 (expert report). But, based on his interview with Madison, Dr. Goff opined that Madison did not have an independent recollection of the murder. Thus, Dr. Goff concluded that Madison did not understand the rationale of the current proceeding as it applied to him. *Id.* at 8-9. Dr. Goff remarked, "I think he understands that he's being executed. but I don't think that he understands why, because I don't think he has those--those memories." Doc. 8-1, Tab R-9 at 55 (hearing). Similarly, Dr. Goff concluded that "I think he understands that [the State is] seeking retribution" but "I don't think he understands the act that he's being -- that he's being punished for." *Id.* at 65. When Dr. Goff formed that conclusion, he was not aware that Madison had always denied responsibility for the murder. *Id.* at 65.

Dr. Goff gave three reasons for believing that Madison cannot remember killing Officer Schulte. First, Dr. Goff concluded that Madison had experienced a thalamic stroke. Doc. 8-3, Tab R-14 at 8 (expert report). Second, Dr. Goff relied on Madison's statements that he does not recall the murder and that he "never went around killing folks." *Id.* at 7; Doc. 8-1, Tab R-9 at 60-61 (hearing). Third, Dr. Goff relied on his evaluation of Madison, including a test he administered showing Madison's trouble completing basic tasks and remembering basic information and Madison's tendency to speak in a rambling vague manner, which indicated to Dr. Goff that Madison "can't remember what it is that he's told me." Doc. 8-3, Tab R-14 at 7 (expert report), Doc. 8-1, Tab R-9 at 59 (hearing).

2. Dr. Kirkland's testimony. The state court appointed Dr. Kirkland to evaluate Madison as a neutral expert on behalf of the court. After Dr. Kirkland evaluated Madison, Dr. Kirkland concluded that Madison

has had "significant body and cognitive decline as a result of strokes." Doc. 8-1, Tab R-9 at 19 (hearing). Nonetheless, Dr. Kirkland concluded that Madison has a rational understanding that he will be executed for killing a police officer in 1985. *Id.*; 8-3, Tab R-13 at 10 (expert report). Dr. Kirkland determined that Madison has a "rational understanding of the sentence, [and] the results or effects of the sentence . . . ." *Id.* at 11. Dr. Kirkland also found that Madison had normal thought content and showed no symptoms of psychosis, paranoia, or delusion. *Id.* at 9.

Dr. Kirkland's conclusions were based on his evaluation of Madison, his review of Madison's medical records, and his discussions with Madison's treating physicians. At the evaluation, Madison gave Dr. Kirkland a detailed history of his life, his criminal record, and his conviction for murder. For instance, Madison said he was the son of Willie Seale and Aldonnia Madison, was "born in an old Mobile Hospital for African Americans that no longer exists," and that he is the "oldest of 11 children, seven boys and four girls," four of whom have died. Doc. 8-3, Tab R-13 at 4-5 (expert report). Madison said he was raised "on the end of Old Stanton Road in Mobile, where Stanton Street runs into Stanton Road." *Id.* at 5. Madison remembers his multiple juvenile arrests and the details of these crimes, including shooting a man in Mississippi, and the time he escaped from the Mt. Meigs Department of Youth Services Camp, hitching "rides all the way back home." *Id.* at 4. Madison remembered trying to join the Army during the Vietnam War because he "knew they would draft him one way or the other," and he remembers being "excluded from the Army by the physical due to be[ing] rated 4F." *Id.* at 5.

Madison also remembered details of his multiple trials, convictions, and appeals. Madison discussed each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCray's court." *Id.* at 9. Dr. Kirkland testified that "[Madison] was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial." Doc. 8-1, Tab R-9 at 68 (hearing). Dr. Kirkland determined that although Madison had physical and mental limitations, Madison "clearly was able to discuss his case in a very accurate manner, including being able to accurately tell this examiner legal theories about why Judge McCray should have recused himself and why he refused to do so." Doc. 8-3, Tab R-13 at 10 (expert report). When asked if Madison had a rational understanding of the reason for his execution, Dr. Kirkland replied, "Certainly. He talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." Doc. 8-1, Tab R-9 at 75 (hearing).

3. The Warden's testimony. The warden testified that when Madison received the death warrant setting his execution date, Madison expressed no confusion or lack of understanding of what it meant, commenting, "[M]y lawyers are supposed to be handling that." Doc. 8-1, Tab R-9 at 75 (hearing). The warden also testified that Madison was not receiving treatment for a mental condition in prison. *Id.*

4. The state court's decision. The state court issued a detailed order, finding Madison competent to be executed. App. 69a-83a. The state court found that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of

the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed. . . . ." App. 82a. In reaching this conclusion, the state judge relied on a number of facts from the hearing, Dr. Kirkland's examination, and Madison's medical records. *See* App. 82a.

Alabama law does not provide a right to appeal this determination in the state court system. *See* Ala. Code § 15-16-23. This is because of the expedited nature of last-minute litigation about executions and because the Alabama Supreme Court is the body that sets an execution date in the first place.

B. Madison files a petition for habeas corpus and receives a stay of execution.

Madison filed a habeas petition in federal court, raising the same claims he raised in the state court proceeding. *See* Doc. 1. The parties agreed that the habeas petition was governed by the deferential standard in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* Doc. 1 at 3; Principal Brief of Petitioner-Appellant, May 11, 2016, at 12–13. A habeas petitioner cannot obtain relief under AEDPA without showing that a state court's adjudication is "contrary to, or an unreasonable application of, clearly established law," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The district court denied Madison's petition for writ of habeas corpus, finding that the state court's decision was not an unreasonable application of the law or facts. App. 67a. The district court explained that the state court had conducted a "fair hearing" where Madison presented evidence through his own

hired expert. App. 60a. The district court concluded that the "state court's determination was neither an unreasonable application of, nor contrary to, clearly established federal law." App. 66a. "It is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." App. 61a.

The Eleventh Circuit granted Madison a stay of execution and a certificate of appealability on the morning of the scheduled execution. App. 87a. The Commissioner asked this Court to vacate the stay of execution because Madison had not established a likelihood of success on his claim that he was incompetent to be executed. Four Justices—the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito—voted to vacate the stay. App. 86a. There were only eight Justices serving on the Court at that time, and the Eleventh Circuit's stay of execution was undisturbed.

C. The court of appeals overrules the state court.

After full briefing and argument, a divided panel of the Eleventh Circuit reversed the district court and granted Madison's petition for writ of habeas corpus. App. 1a. Judges Martin and Wilson concluded that the state court both unreasonably determined the facts and unreasonably applied the law. *See* App. 19a, 25a.

Both of these conclusions stem from the majority's belief that an inmate cannot be executed if he does not remember or acknowledge committing murder.

First, the court of appeals rejected the state court's fact-finding that Madison had a rational understanding of why he was being executed. The problem with the state court's fact finding, according to the majority, was that "Dr. Kirkland's testimony is not relevant to the competency inquiry called for by the Supreme Court." App. 19a. This was so, the court reasoned, because "the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime." App. 20a. It was not relevant, according to the majority, that Dr. Kirkland "'testified that Mr. Madison 'was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense." App. 20a-21a. According to the majority, Madison's ability to remember events before and after the offense does not show that he "can remember the event that matters here—his capital offense." App. 20a.

Second, the court of appeals held that the state court's decision involved an unreasonable application of clearly-established law. The problem, according to the two judges in the majority, is that the state court "never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone." App. 25a. According to the court of appeals, it is dispositive that Madison "isn't aware he committed the underlying crime—he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. "A person cannot rationally understand why he is being killed if, according to his 'concept of reality,' he never committed a crime." App. 27a. "A finding that a man with no memory of what

he did wrong has a rational understanding of why he is being put to death is patently unreasonable." App. 27a.

Judge Jordan dissented. App. 29a. He relied on the deferential standard of review that must be afforded to a state court's fact-findings under AEDPA. "I do not believe that Mr. Madison can overcome the presumption of correctness afforded to the state trial court's factual finding by clear and convincing evidence." App. 32a. "What matters here is that there is evidence in the record which supports a finding that Mr. Madison is competent." App. 35a. Specifically, Judge Jordan noted that the court's expert Dr. Kirkland found Madison to be competent after examining him and reviewing his medical records. App. 36a. Dr. Kirkland's conclusion was based on the fact that Madison has no "psychosis, paranoia, or delusion," remembers his trials and appeals in detail, and can discuss legal theories and other similar matters with his attorneys. App. 36a. Judge Jordan explained that "the state trial court considered but implicitly rejected Dr. Goff's [contrary] opinion." App. 37a.

REASONS THE COURT SHOULD GRANT THE WRIT

The Eleventh Circuit's decision to bar Madison's execution creates a circuit split and conflicts with numerous decisions of this Court. The Constitution prohibits "a State from carrying out a sentence of death upon a prisoner who is insane," *Ford*, 477 U.S. at 409–10, including one who "suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960. But this Court has expressly held that a State may execute

prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id.* at 959.

The Court should grant the writ and reverse, either summarily or after full briefing and argument. In this case, the experts agree that Madison is not delusional and that he understands the nature, cause, and consequences of his death sentence. That Madison claims he forgot the murder he committed—a murder for which he has never accepted responsibility—is not a legitimate reason to bar his execution. At the very least, the state court's decision to reject the testimony of Madison's hired expert was not objectively unreasonable under AEDPA.

I. The lower courts are split on whether a prisoner can be executed if he does not remember or otherwise acknowledge committing the murder.

The Eleventh Circuit's decision creates a clear split of authority on the question of whether a state can execute an inmate who does not remember or otherwise acknowledge committing murder. On one side of the split stands the Eleventh Circuit. On the other side stands the Sixth Circuit, the Fifth Circuit, and state supreme courts.

This Court's caselaw. This Court has addressed an inmate's competency to be executed two times. Each time, this Court focused on an inmate's *sanity*. It has never even suggested that a murderer cannot be executed because he forgot, or otherwise denies responsibility for, committing the murder for which he was convicted.

First, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Id. at* 410 (plurality opinion). Concurring in *Ford*, Justice Powell declared that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring).

Second, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court rejected a lower court's rule that "foreclosed petitioner from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Id.* at 959. There were two important caveats to the Court's holding. The Court conceded that "a concept like rational understanding is difficult to define" and, therefore, did not "attempt to set down a rule governing all competency determinations." *Id.* at 960-61. The Court also held that its rule did not apply to prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id.* at 959.

The Eleventh Circuit. In this case, the Eleventh Circuit misapplied *Ford* and *Panetti*. It held that a murderer cannot be executed unless he remembers or otherwise acknowledges committing the murder that led to his conviction. The court adopted that proposition as a bright-line rule: "[a] finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." *Id.* at 1188-89. According to the Eleventh Circuit, a person cannot be executed if he "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App.

26a. The Eleventh Circuit held that this principle was "clearly established" by this Court's precedents such that it applies even under AEDPA. And it rejected the state court's fact-finding because the state court's appointed expert never "assessed whether Mr. Madison could remember the crime." App. 19a. The Eleventh Circuit barred Madison's execution.

The Sixth Circuit. The Sixth Circuit has adopted precisely the opposite rule. Whereas the Eleventh Circuit believes an inmate's memory and acknowledgement of the crime is dispositive, the Sixth Circuit believes it is irrelevant. In *Bedford v. Bobby*, 645 F.3d 372, 374-75, 378 (CA6 2011), an inmate filed a petition for habeas corpus, claiming that he was not competent to be executed because he did not remember the murder. There, as here, the inmate's expert testified that his "condition ha[d] ... deteriorated ... with the onset of . . . dementia," his "memory [wa]s severely impaired," and he "lack[ed] intact memories of events and easily confuse[d] memories he does have or that others attempt to remind him about." *Id.* at 378.

The district court granted the prisoner's motion for a stay of execution, but the Sixth Circuit reversed. *Id.* at 380. The Sixth Circuit held that the inmate's claim had no chance of success on the merits. The Sixth Circuit reasoned that, "even on their own terms," the expert's conclusions about the inmate's lack of memory "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment, much less make it unreasonable to conclude to the contrary (as the state courts did)." *Id.* Instead, the Sixth Circuit correctly explained that the "Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of incompetence that prohibits the execution

of a defendant." *Id.* at 378-79. This Court denied the inmate's request to stay his execution, and he was executed that same day. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011); *Ohio Man Executed for Double Murder He Doesn't Remember*, Daily Mail (May 17, 2011).[1]

The Fifth Circuit. The Fifth Circuit has also rejected an incompetence claim based on purported amnesia. In *Simon v. Fisher*, 641 F. App'x 386, 386-87 (CA5 2016), an inmate alleged that he was incompetent to be executed because he suffered significant memory loss from a head injury. *Id.* The inmate's expert opined that the inmate suffered from "global amnesia" and had "essentially lost his identity in his amnesia"; the state's expert testified that the petitioner was malingering his memory loss. *Id.* at 387-88. Citing the Sixth Circuit, the district court held "that Simon's purported inability to recall that he committed several murders and was sentenced to death is, standing alone, insufficient to constitutionally restrict his death sentence." *Simon v. McCarty*, No. 2:11-CV-111-SA, 2014 WL 7338860, at *34 (N.D. Miss. Dec. 22, 2014). The Fifth Circuit affirmed the district court's competency decision because it "rest[ed] on an evaluation of conflicting expert opinions." 641 F. App'x at 389-90. Although the court's discussion focused on allegations that the petitioner was malingering his memory loss, the Fifth Circuit also quoted the Sixth Circuit's holding that "[t]he Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of in-

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[1] http://www.dailymail.co.uk/news/article-1388091/Ohio-man-Daniel-Lee-Bedford-executed-double-murder-doesnt-remember.html (last visited July 27, 2017)

competence that prohibits the execution of a defendant." *Id.* at 389. This Court denied certiorari earlier this year. *See* 137 S. Ct. 626 (Jan. 9, 2017).

Although *Simon* is unpublished, it is nonetheless important for two reasons. First, because of the time pressures of a pending execution, most litigation about competency to be executed is resolved by unpublished opinions. Second, the psychologist who opined that Simon suffered from "global amnesia" was the same psychologist who testified that Madison could not remember his crimes—Dr. John Goff. *See Simon*, 2014 WL 7338860 at *17 (summarizing Goff's conclusions). The Fifth Circuit properly allowed the district court in *Simon* to disbelieve Dr. Goff even though AEDPA played no role in that case; the Eleventh Circuit improperly disallowed the state court from doing the same thing here even though AEDPA imposes a more highly deferential standard of review. *See* App. 37a (Jordan, J., dissenting) ("the state trial court considered but implicitly rejected Dr. Goff's opinion").

State supreme courts. State supreme courts have likewise held that an inmate may be executed in circumstances like these.

In *State v. Irick*, 320 S.W.3d 284, 286 (Tenn. 2010), the Tennessee Supreme Court held that an inmate could be executed even though he purportedly forgot the murder. There, the inmate argued that he could not be executed because, among other things, he "has no memory of the events surrounding the murder." *Id.* at 296. The inmate's expert concluded that the inmate's "expressed inability to remember the offense was genuine." *Id.* at 289. The state's expert agreed that his memory problems were genuine, but testified

that they were not "outside the range of age-related memory decline." *Id.* at 291. Ultimately, the court rejected the inmate's competency claim because, just like Madison, he understood "that he has been convicted of murdering the victim," understood that he was "scheduled to be executed for this crime," and did not "manifest any symptoms of formal thought disorder, hallucinations, or delusions." *Id.* at 295-96.

Similarly, in *State ex rel. Middleton v. Terry Russell*, 435 S.W.3d 83 (Mo. 2014), the Supreme Court of Missouri held that a prisoner could be executed even though delusions caused him to believe that he did not commit a murder. A psychologist testified that the prisoner had a "psychotic mental illness" that led him to believe "his conviction was the result of a conspiracy." *Id.* at 84. The court held that this kind of mental problem was not the lack of rational understanding contemplated in *Panetti*: "Middleton plainly understands he is to be executed as punishment because he was found guilty of murdering his three victims; he simply believes he should not have been convicted." *Id.* at 85. This Court denied a stay of execution. *See Middleton v. Russell*, No. 14A64 (July 16, 2014). The Missouri Supreme Court continues to apply this rule in other cases. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 745 (Mo. 2015) ("neither the fact that Clayton believes he should not have been convicted nor the fact that he believes he will be spared execution are sufficient to make a threshold showing that he is incompetent"), *cert. denied* 135 S.Ct. 1697 (2015).

This split of authority compels certiorari review. As this Court's docket reflects, states in the Eleventh,

Sixth, and Fifth Circuits conduct the majority of executions in this country.[2] And states that actually conduct executions are the only states in which the competency issue can be raised. *E.g. Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998) ("because his execution was not imminent . . . his competency to be executed could not be determined at that time"). If Madison had litigated this issue in Ohio, instead of Alabama, he would have been executed on May 12, 2016.

II. The court of appeals' decision is contrary to this Court's precedents.

Not only does the decision below create a split, it is also a demonstrably incorrect application of this Court's precedents. "It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013). The ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice."

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[2] The Court allowed an execution to proceed in the Sixth Circuit the week before this petition was filed. *See Phillips v Jenkins*, 17A105 (July 25, 2017). Over the last two Terms, this Court has allowed 12 executions to proceed in the Eleventh Circuit alone. *See Melson v. Dunn*, 16A1212 (June 8, 2017); *Arthur v. Dunn*, 16A1161 (May 25, 2017); *Ledford v. Dozier*, 16A1118 (May 16, 2017); *Smith v. Alabama*, 16A569 (Nov. 22, 2016); *Lawler v. Sellers*, 16A390 (Oct. 19, 2016); *Terrell v. Bryson*, 15A606 (Dec. 8, 2015); *Bolin v. Jones*, 15-7662 (Jan. 7, 2016); *Jones v. Bryson*, 15A800 (Feb. 2, 2016); *Hittson v. Chatman*, 15A857 (Feb. 17, 2016); *Bishop v. Chatman*, 15A1012 (March 31, 2016); *In re Kenneth Fults*, 15A1033 (April 12, 2016); *Daniel v. Chatman*, 15A1116 (April 27, 2016).

Woods v. Donald, 135 S.Ct. 1372, 1376 (2015) (per curiam). Likewise, when evaluating factual determinations, AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007) (quoting 28 U.S.C. § 2254(e)). This is "meant to be" a difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Eleventh Circuit purported to apply this deferential standard, but it obviously did not.

A. A prisoner's failure to remember or acknowledge his crime does not render him incompetent to be executed.

This Court has never held that the Constitution bars an execution if the murderer "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, all of this Court's competency cases are about "the prohibition against executing a prisoner *who has lost his sanity*." *Panetti*, 551 U.S. at 958 (emphasis added). With respect to other allegations of incompetence, the Court has declined to "attempt to set down a rule." *Id.* at 959. Moreover, the Court has held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.*

1. The absence of any holding from this Court is dispositive under AEDPA. By applying a rule that this Court has never adopted, the court of appeals committed the same error that led this Court to

reverse the lower courts in *White v. Woodall*, 134 S.Ct. 1697 (2014), and in *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017).

In *Woodall*, as here, the court of appeals granted a habeas petition in a capital case. The court held that the Constitution required a "no-adverse inference instruction" when a defendant declined to testify at the penalty phase of his capital trial. *Woodall*, 134 S.Ct. at 1703. In reversing, this Court explained that its cases had left "open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." *Id.* Although there were "reasonable arguments" that these precedents should be extended to require a "no-adverse inference instruction" at the penalty phase of trial, the Court held that a federal court may not extend this Court's precedents to their "logical next step" in a habeas case. *Id.* at 1706.

Similarly, a few months ago in *Virginia v. LeBlanc*, the Court summarily reversed the lower court's application of *Graham v. Florida*, 560 U.S. 48 (2010), in a habeas case. In *Graham*, the Court held that life-without-parole sentences may not imposed on non-murderer juvenile offenders. In *LeBlanc*, the court of appeals determined that a state court unreasonably relied on the availability of a "geriatric release program" to satisfy *Graham*'s requirement that juvenile offenders have an opportunity for parole. 137 S.Ct. at 1728. This Court summarily reversed the court of appeals because "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented." *Id.*

The Court should reverse the court of appeals for the same reasons it reversed in *Woodall* and *LeBlanc*. As in *Leblanc*, the Court has never addressed the issue here: whether a murderer can be executed if he "believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, as in *Woodall*, the Court has left the question open. The Court intentionally declined to "attempt to set down a rule" governing claims of incompetence "other than those stemming from a severe mental illness." *Panetti*, 551 U.S. at 959. A federal court cannot create a new rule in an AEDPA case, but that is precisely what the Eleventh Circuit did here.

2. Even apart from AEDPA, however, the court of appeals' rule would be wrong. A murderer's purported inability to remember his crime does not undermine his "recognition of the severity of the offense" or the community's interest in "affirm[ing] its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti*, 551 U.S. at 958-59. "[E]veryone is amnesic to some degree" because "every individual's memory process is marked by some distortion." *Note, Amnesia: A Case Study in the Limits of Particular Justice*, 71 Yale L. J. 109, 109-10 (1961). But such memory problems do not stop us from having a rational understanding of our past. Adults do not independently remember every bad act they committed as a child, but they can rationally understand that they were responsible for them, acknowledge why they were punished, and feel remorse for their wrongdoing.

For their part, the relevant professional associations have adopted standards that focus on psychosis, not memory. The American Bar Association does not address "memory" in its standard for competence to be

executed. That standard instead provides that a "convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment." Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[3] Like the ABA, the American Psychiatric Association and the American Psychological Association are concerned about inmates with "profound deficiencies in understanding" that are "associated with mental retardation and with delusional beliefs." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 676 (2006). These organizations believe an inmate is competent to be executed if he has "a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people." *Id.*

Lastly, there are significant practical problems with the Eleventh Circuit's holding that amnesia is a bar to execution. In particular, "false pleas of amnesia by criminal defendants are both common and difficult to detect." *Price v. Thurmer*, 637 F.3d 831, 834 (CA7 2011) (citing Marko Jelicic, Harald Merckelbach & Saskia van Bergen, "Symptom Validity Testing of Feigned Amnesia for a Mock Crime," 19 Archives of Clinical Neuropsychology 525 (2004)). Although there are tests for detecting false claims of amnesia, "'there is still ... no 'gold standard' measure for distinguishing between cases of genuine and feigned amnesia.'" *Id.*

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[3] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

(quoting Xue Sun et al., "Does Feigning Amnesia Impair Subsequent Recall?," 37 Memory & Cognition 81 (2009)).

B. The state court was not objectively unreasonable when it found that Madison was competent to be executed.

As Judge Jordan explains in dissent, the majority's decision to reject the state court's fact-finding is even more egregious than its conclusion that the state court made a legal error. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841 (2010). Instead, the prisoner bears the burden of rebutting the state court's factual findings by clear and convincing evidence. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

The court of appeals erroneously rejected the state court's fact-finding for two reasons. Both are based on the Eleventh Circuit's conclusion that a prisoner may not be executed if he does not remember or otherwise acknowledge committing murder.

First, the court of appeals incorrectly held that Dr. Kirkland's opinion was irrelevant because he never asked Madison if he could remember the crime. But, because this Court has never held that an inmate's lack of memory bars an execution, it is simply not true that Dr. Kirkland's "testimony is not relevant to the competency inquiry called for by the Supreme Court" or that Dr. Kirkland "simply wasn't looking at the right issues." App. 20a-21a. *See* also App. 19a (complaining that Dr. Kirkland never "assessed whether Mr. Madison could remember the crime"). Dr. Kirkland reviewed Madison's medical records, consulted

his treating physicians, and interviewed him about his understanding of the case and the pending execution. Dr. Kirkland concluded that Madison was not suffering from psychosis or delusions and understood that he was being executed for murder. Even Dr. Goff admitted that Madison "understands the sentence" and that the state is "seeking retribution." Doc. 8-3, Tab R-14 at 18; Doc. 8-1, Tab R-9 at 65. These are relevant considerations in determining whether a prisoner has a rational understanding of his punishment. *See* Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[4]

Second, the court of appeals was wrong that "it is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense." App. 19a. Although no one disputes that Madison has experienced cognitive decline over the years, Madison did not testify. Instead, the only evidence in the record for Madison's selective amnesia is the testimony of Dr. Goff, which the state trial court declined to credit and which merely vouched for Madison's own self-serving statements. When Dr. Goff made his assessment, he did not even know that Madison has always refused to take responsibility for committing the murder. Perhaps for these reasons, among others, "the state trial court considered but implicitly rejected Dr. Goff's" testimony. App. 37a (Jordan, J., dissenting).

Moreover, Dr. Kirkland's testimony undermined Madison's claim of amnesia. As the Eleventh Circuit noted, Dr. Kirkland testified that Madison "was able

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[4] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

to talk with me about very specific things that would indicate he could remember specific things about the time of the offense." App. 20a. That Madison admits to remembering events around the murder—and other violent crimes that he has committed—obviously weakens his assertion that he cannot remember the murder itself. Other than this kind of circumstantial evidence, the only way for the Commissioner to challenge Madison's claim of amnesia would be for Madison to admit that he committed the murder and can remember it. But the state courts should not have to take a condemned murderer at his word that he has selective amnesia. *See Price*, 637 F.3d at 834 (for amnesia to "operate as a defense to competence to stand trial . . . something more than the defendant's word would have to be shown, given the ease of making such a claim, the difficulty of countering it, and hence the temptation to abuse it"). As Judge Jordan concluded in dissent, the state court was within its rights to find Madison competent to be executed.

III. The case is a good vehicle for summary reversal or plenary review.

This case is a good candidate for summary reversal or plenary review. As explained above, the court of appeals' decision creates a split of authority and contradicts this Court's caselaw. Other considerations also underscore that the Court should grant the writ.

First, the Court is already familiar with this case. Last year, after the Eleventh Circuit stayed Madison's execution, four members of the Court voted to vacate that stay, presumably concluding that Madison could not establish a substantial likelihood of success. App. 86a.

Second, this case comes to the court after a full review in the lower courts, which is unusual for a claim about an inmate's competency to be executed. Most litigation about an inmate's competency to be executed occurs on an expedited basis and, when a motion to stay execution is denied, the case is over. Because the court of appeals (erroneously) granted a stay of execution in this case, the Court can address the question presented in a full and orderly manner based on a published panel opinion with a dissent.

Third, the Court should answer this question now so that it does not have to answer it through ad hoc motions to stay execution. If the Court does not take this case, the Court will need to decide whether to grant stays of execution for prisoners who refuse to acknowledge committing murder but who were tried outside of the Eleventh Circuit. The Court's rulings on those motions will, as a practical matter, answer the question for the inmate involved. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011) (denying stay of execution). But that is not the best or fairest way to adjudicate a legal issue.

Fourth, although only a few circuits are responsible for the split at issue here, those circuits are the ones that matter. States in the Eleventh, Sixth, and Fifth Circuits have been responsible for the majority of executions over the last few years. Because the Eleventh Circuit's decision reverses a state court on habeas review, state courts in Alabama, Georgia, and Florida are, as a practical matter, bound to follow it.

Fifth, this case has consumed enormous state resources. Madison has been tried and convicted three times for this murder. He has been through the full

gamut of post-conviction review with attendant appeals. The district court held an evidentiary hearing on Madison's initial habeas petition. The state court appointed its own expert to review Madison's competency and held a hearing on that claim as well. The Eleventh Circuit's decision "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 131 S. Ct. at 786.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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August 2, 2017

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

D.C. Docket No. 1:16-cv-00191-KD-M

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(March 15, 2017)

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

MARTIN, Circuit Judge:

Thirty years ago, the Supreme Court held that the Eighth Amendment prohibits the execution of a

person who is incompetent.[1] Ford v. Wainwright, 477 U.S. 399, 409–10, 106 S. Ct. 2595, 2602 (1986). The Court has since clarified that a person cannot be executed if he lacks a "rational understanding" of the reason for his execution. Panetti v. Quarterman, 551 U.S. 930, 954–60, 127 S. Ct. 2842, 2859–62 (2007). This standard requires the prisoner to be able to rationally understand the connection between the crime he committed and the punishment he is to receive. See Ferguson v. Sec'y, Florida Dep't of Corr., 716 F.3d 1315, 1336 (11th Cir. 2013). The Supreme Court told us that if the prisoner does not understand this connection, "the punishment can serve no proper purpose" and cannot be carried out. Panetti, 551 U.S. at 960, 127 S. Ct. at 2862.

This habeas petitioner, Vernon Madison, is a 66-year-old man on death row for the murder of a police officer over three decades ago. In recent years, Mr. Madison has suffered strokes resulting in significant cognitive and physical decline. His lawyers argue here that he is mentally incompetent to be executed under Ford and Panetti. Finding that Mr. Madison had made a substantial threshold showing of incompetency, an Alabama trial court held a competency hearing. At the hearing, Mr. Madison presented unrebutted testimony from Dr. John Goff that his strokes caused major vascular disorder (also known as vascular dementia) and related memory impairments and that, as a result, he has no memory of committing the murder—the very act that is the

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[1] While the Court used the term "insane" in Ford, post-Ford decisions identify the issue as "competency to be executed." E.g., Herrera v. Collins, 506 U.S. 390, 439, 113 S. Ct. 853, 881 (1993).

reason for his execution. To the contrary, Mr. Madison does not believe he ever killed anyone. Dr. Goff testified that due to his memory impairments, Mr. Madison does not have a rational understanding of why the state is seeking to execute him. The State presented expert testimony from Dr. Karl Kirkland. Dr. Kirkland testified that Mr. Madison was able to accurately discuss his legal appeals and legal theories with his attorneys and—on pretty much this basis alone—concluded that Mr. Madison has "a rational understanding of [his] sentence." Accepting the testimony of Dr. Kirkland, the Alabama trial court decided that Mr. Madison is competent to be executed. Mr. Madison argues that the trial court's decision relied on an unreasonable determination of the facts and involved an unreasonable application of the law. We agree.

In so holding, we are mindful of the great deference due to state court decisions on federal habeas review, particularly when the state court is applying a general standard like the one in Panetti. See Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." (quotation omitted)). But "even a general standard may be applied in an unreasonable manner." Panetti, 551 U.S. at 953, 127 S. Ct. at 2858. Panetti may set out a general standard for competency, but the focus of the inquiry is clear. Panetti doesn't ask whether the prisoner can talk about the history of his case or legal theories with his attorneys. Instead, Panetti requires courts to look at whether the prisoner is able to rationally understand the connection between the crime he committed and the punishment he is to receive. See

Panetti, 551 U.S. at 960, 127 S. Ct. at 2862. One of the experts testified that due to a mental disorder, Mr. Madison was not able to make this connection. The other expert never addressed this question at all. This record is therefore wholly insufficient to support the trial court's decision. We conclude that the state court's decision that Mr. Madison is competent to be executed rested on an unreasonable determination of the facts and involved an unreasonable application of Panetti. We therefore reverse the District Court's denial of habeas relief.

I. BACKGROUND AND PROCEDURAL HISTORY

Mr. Madison has been tried three times for killing a police officer in 1985. Madison v. State, 718 So.2d 90, 94 (Ala. Crim. App. 1997). His first two convictions were reversed. At his third trial, the jury found Mr. Madison guilty of capital murder and recommended a life sentence by an 8-4 vote. See id. The trial judge overrode the jury's recommendation and sentenced Mr. Madison to death. Id. His conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, id. at 104, and the Alabama Supreme Court. Ex parte Madison, 718 So.2d 104, 108 (Ala. 1998).

In February 2016, following the denial of state and federal habeas relief, Mr. Madison filed a petition for suspension of his death sentence in the Circuit Court of Mobile County, Alabama, arguing that he was incompetent to be executed under Ford and Alabama law. See Ala. Code § 15-16-23 (providing that the trial court shall suspend the execution of a death sentence if "it is made to appear to the satisfaction of the trial court that the

[prisoner] is then insane"). The Alabama trial court found that Mr. Madison had made a preliminary showing of incompetency, ordered that Mr. Madison be evaluated by a court-appointed expert, and scheduled a competency hearing. At the competency hearing, the court heard testimony from the court-appointed expert as well as Mr. Madison's expert. The court issued an order on April 29, 2016, finding that Mr. Madison was competent to be executed. Under state law, this ruling is not subject to review by any other Alabama court. See Ala. Code § 15-16-23.

Mr. Madison then filed a motion for a stay of execution and a petition for federal habeas relief in the U.S. District Court. The District Court found that Mr. Madison had exhausted his Ford claim, but it denied relief on the merits.[2] Mr. Madison appealed, and we granted Mr. Madison's motion for a certificate of appealability, stayed his execution, and ordered expedited briefing on the merits of his Ford claim.

II. FACTS

A. MR. MADISON'S CURRENT MEDICAL CONDITION

Mr. Madison, who is 66 years old, has a history of physical and mental impairments. He is legally blind, cannot walk independently, is incontinent, and has slurred speech. He has also suffered at

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[2] Although this is Mr. Madison's second federal habeas petition, it is not barred as "second or successive" under 28 U.S.C. § 2244(b) because his Ford claim did not become ripe until his execution was imminent. See Panetti, 551 U.S. at 945–47, 127 S. Ct. at 2853–55.

least two recent strokes—one in May 2015 and another in January 2016.[3] The May 2015 stroke was severe, and affected Mr. Madison's vision while also causing a substantial deficit in motor coordination. After this stroke, he showed signs of memory loss, repeatedly asking that his mother be informed that he had a stroke despite the fact that she had passed away several years earlier. On January 4, 2016, Mr. Madison had another stroke. He was found in his prison cell, unresponsive and incontinent. Medical records document that Mr. Madison was in an altered mental status after the January 2016 stroke. He appeared "very confused" and disoriented, and he exhibited signs of memory loss.

Following these strokes, Mr. Madison's legal team noticed a significant decline in his mental status, including memory loss, difficulty communicating, and profound disorientation and confusion. Mr. Madison reported frequently urinating on himself because "no one will let me out to use the bathroom," although he has a toilet in his cell. And Mr. Madison told his attorney during a visit in February 2016 that he planned to move to Florida after his release from prison. As a result, Mr. Madison's attorneys requested—and the Alabama trial court granted—a hearing to determine whether Mr. Madison is competent to be executed.

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[3] The record indicates that Mr. Madison likely suffered other strokes before May 2015.

B. THE STATE COURT COMPETENCY HEARING

Before the hearing, Mr. Madison was evaluated by Dr. Kirkland, the court-appointed psychologist, and Dr. Goff, a neuropsychologist retained by Mr. Madison's counsel. Both experts reviewed Mr. Madison's medical records and examined him. Both experts testified at the hearing and prepared written reports that were admitted into evidence.

1. The Expert Reports

In his report, Dr. Kirkland acknowledged that Mr. Madison's strokes had caused significant physical and cognitive decline and found no indication of malingering. Despite this decline, Dr. Kirkland found that Mr. Madison was able to accurately describe the history of his case regarding his appeals and was aware that the trial judge had overridden the jury's life sentence. Dr. Kirkland also noted that Mr. Madison could discuss details from his youth, such as where he attended elementary and high school. The report concluded that "Mr. Madison appears to be able to have a rational understanding of the sentence, the results or effects of the sentence, and to still be able to discuss defense and legal theories with his attorneys."

Dr. Goff's report also concluded that Mr. Madison had suffered "significant cognitive decline" due to his strokes and that there was no clinical indication of malingering. He administered the fourth edition of the Weschsler Adult Intelligence Scale (WAIS-IV) and calculated a General Ability Index of 72, which

falls within the borderline range of intelligence.[4] According to Dr. Goff's report, this score marked a very significant decline from Mr. Madison's previous levels of function. The report explained that Mr. Madison's Working Memory Index of 58 reflected "a very substantial deficit" in regard to working memory and that Mr. Madison had "a significant cognitive deficit."[5]

Dr. Goff diagnosed Mr. Madison with major vascular neurological disorder (vascular dementia) and reported that Madison suffered from retrograde amnesia. As a result, Mr. Madison could not recall certain past events that happened before his January 2016 stroke. Dr. Goff's report explained that if Mr. Madison was told a fact or a series of facts he might be able to recall this new information, but he would not be able to recall any memories affected by the retrograde amnesia.

According to Dr. Goff, Mr. Madison didn't have an independent recollection of his crime or the identity of the victim. Dr. Goff reported:

> When [I] asked [Mr. Madison] where he was convicted from he said, "It must have been Mobile" although he seemed unsure. Again he was able to tell me that the crime "must have been a murder." He could not identify the name of the victim. . . . [H]e indicates that he does not believe that he

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[4] A full scale IQ score could not be calculated because Dr. Goff was unable to administer two subscales of the WAIS-IV due to Mr. Madison's vision problems.

[5] The Working Memory Index is scored on a scale like an IQ test, where the mean is 100 and the standardization is 15.

> ever killed anybody because, "I never went around killing folks."

The report noted that Mr. Madison was not able to tell Dr. Goff the sequence of events from the offense to his arrest to the trial or any related details. During the interview, Mr. Madison said that he had been told by others that he had three trials and that the judge had overridden the jury's life sentence.

Dr. Goff reported that Mr. Madison understood the meaning of "execution" and "the idea of being dead." Dr. Goff concluded that Mr. Madison understood what he had been tried for but—because he could not remember the underlying crime and didn't believe he had ever killed anyone—"[h]e does not seem to understand the reasoning behind the current proceeding [his execution] as it applies to him."

2. The Evidentiary Hearing

Dr. Kirkland, Dr. Goff, and Mr. Madison's prison warden testified at the competency hearing. Dr. Kirkland emphasized Mr. Madison's ability to discuss the details of his legal appeals and the current status of his case. Dr. Kirkland also testified that Mr. Madison was aware of his execution. On redirect examination, Dr. Kirkland acknowledged that Mr. Madison's mental condition had significantly deteriorated, but he testified that Mr. Madison was able to talk "about very specific things that would indicate that he could remember specific things about the time of the offense." In response to the court's question of whether Mr. Madison understood that the state was seeking retribution for an act that he had committed, Dr. Kirkland replied:

"Certainly. [Mr. Madison] talked specifically about [a] death sentence versus life without [parole] in the original trial and the first retrial and in the second."

Dr. Goff's testimony at the evidentiary hearing largely followed his report. Dr. Goff testified that the stroke Mr. Madison suffered in January 2016 likely caused his memory problems. Dr. Goff described this event as a thalamic stroke— a type of stroke that commonly results in memory problems as well as other difficulties—and this conclusion was in keeping with an MRI report showing a "[t]iny focal acute to subacute infarct in the right thalamus." According to Dr. Goff, areas of Mr. Madison's brain have essentially died as a result of his strokes, and this is consistent with Mr. Madison's medical records.[6] It appeared to Dr. Goff that the basis of Mr. Madison's

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[6] The State suggests that Mr. Madison didn't really have a thalamic stroke, pointing to medical records indicating that Mr. Madison's January 2016 event was caused by drug use. While it's true there was some evidence of drug use, both experts agreed that Mr. Madison's cognitive decline resulted from strokes. And MRI imaging confirms that Mr. Madison had a "very small acute CVA" and a "new small right thalamic infarct." "CVA" stands for "cerebrovascular accident," which is also referred to as a stroke. See Medline Plus Medical Dictionary. http://c.merriam-webster.com/medlineplus/stroke (last visited October 13, 2016). An "infarct" refers to an area of dead tissue caused by a restriction in blood flow. See id., http://c.merriam-webster.com/medlineplus/infarct (last visited October 13, 2016). As Dr. Goff explained, an "infarct" is, in lay terms, a stroke. Mr. Madison's medical records also show that he has encephalomalacia, which refers to "softening of the brain due to degenerative changes in nervous tissue." See id., http://c.merriam-webster.com/medlineplus/encephalomalacia (last visited October 28, 2016). The medical records clearly establish that Mr. Madison had a stroke that affected his thalamus and that parts of his brain have died.

knowledge about his case was information he learned from his attorneys. Dr. Goff testified that Mr. Madison understood that the State was seeking retribution but didn't understand the past act for which he was being punished. Dr. Goff concluded that Mr. Madison understood he was being executed but—because he lacked memories of his past—didn't understand why.

3. Warden Davenport

The state called as a witness Warden Davenport, who had served the death warrant on Mr. Madison. Mr. Davenport testified that he read the court order setting the execution date to Mr. Madison and that Mr. Madison said "my lawyers are supposed to be handling that." The Warden also testified that prisoners are assigned mental health codes if they receive mental health care. According to Mr. Davenport, Mr. Madison's mental health code was zero, which indicates that Madison was not receiving treatment for a mental health condition.

C. THE ALABAMA COURT'S COMPETENCY DECISION

The Alabama trial court issued a written order in which it held that Mr. Madison was competent to be executed. The court identified Ford and Panetti as the relevant standards. It stated that the burden of proof was on Mr. Madison to show, by a preponderance of the evidence, "that [he] suffers from a mental illness which deprives [him] of the capacity to rationally understand that he is being executed as a punishment for a crime." The court's order summarized the evidence from the competency hearing, including the testimony of Dr. Kirkland and

Dr. Goff. It then found that Mr. Madison had failed to prove his incompetence by a preponderance of the evidence. The court "accept[ed]" the testimony of Dr. Kirkland regarding Mr. Madison's understanding of his execution. It found that Mr. Madison "has a rational[] understanding, as required by Panetti, that he is going to be executed because of the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed."

III. STANDARD OF REVIEW

This appeal is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[7] AEDPA imposes a

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[7] Mr. Madison argues that the lack of appellate review in Alabama state court for Ford claims precludes the application of AEDPA to his federal habeas petition. See Ala. Code § 15-16-23 (prohibiting appellate review of trial court's competency finding). Mr. Madison has good reason to be concerned about this. AEDPA severely limits the ability of federal courts to review state court decisions for constitutional error. As a result, state courts are the primary guardians of the constitutional rights of state prisoners. See Burt v. Titlow, 134 S. Ct. 10, 15-16 (2013) ("Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."). Alabama's statutory scheme relegates an important question—whether a person's impending execution is prohibited by the Constitution—to a single judge and makes that judge's determination unreviewable by the state's appellate courts. While we have concerns about a scheme that singles out one type of constitutional claim for less review (and consequently less protection) than other types of constitutional claims, we need not reach this issue because we conclude Mr. Madison is entitled to relief even under AEDPA's deferential standard of review.

"highly deferential standard for evaluating state-court rulings." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (quotation omitted). It bars federal courts from granting habeas relief on a claim that was adjudicated on the merits in state court unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71–72, 123 S. Ct. 1166, 1172 (2003). It "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000).

A state court decision is "contrary to" clearly established federal law if the state court applied "a rule different from the governing law set forth in [Supreme Court] cases, or if it decide[d] a case differently than [the Supreme Court] ha[s] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002). A state court decision involves an "unreasonable application" of clearly established federal law if the state court (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2)

"either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407, 120 S. Ct. at 1520. The "unreasonable application" inquiry focuses on whether the state court's application of Supreme Court precedent was "objectively unreasonable," id. at 409, 120 S. Ct. at 1521, which "requires the state court decision to be more than incorrect or erroneous." Lockyer, 538 U.S. at 75, 123 S. Ct. at 1174.

We afford state court findings of fact "substantial deference." Brumfield v. Cain, 576 U.S. ___, 135 S. Ct. 2269, 2277 (2015). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). A finding of fact is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849 (2010). Indeed, we presume that a state court's findings of fact are correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). But

> when a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found

> facts or to the legal conclusions that flow from them.

Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc) (quotation omitted and alterations adopted). And we bear in mind that "[d]eference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Miller-El, 537 U.S. at 340, 123 S. Ct. at 1041.

V. DISCUSSION[8]

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[8] In the District Court proceedings, the parties disputed whether Mr. Madison exhausted his Ford claim in state court. There, the State argued that Mr. Madison failed to exhaust because he did not appeal the trial court's decision to the Alabama Court of Criminal Appeals. The District Court found to the contrary that Mr. Madison had exhausted his claim. Although the State did not renew this exhaustion argument on appeal, and conceded at oral argument that it wasn't sure whether its position was even correct, we write to explain that the District Court got this right.

Section 15-16-23, which grants an Alabama trial court the authority to suspend a death sentence if the petitioner is incompetent to be executed, explicitly precludes review by any other judge or court. See Ala. Code § 15-16-23 ("This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge."). The Alabama Court of Criminal Appeals has twice held that § 15-16-23 precludes appellate review of the trial court's competency determination, and these decisions have not been overruled. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (granting state's motion to dismiss appeal because Ala. Code § 15-16-23 "clearly states that a finding by the trial court on the issue of insanity, as it relates

A. THE COMPETENCY STANDARD

We begin our analysis with the Supreme Court precedent on the competency standard. In Ford, the Court held that the Eighth Amendment prohibits the state from executing a person who is incompetent. The plurality opinion reasoned that the Eighth Amendment prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." Ford, 477 U.S. at 417, 106 S. Ct at 2606. In a concurring opinion, Justice Powell concluded that the Eighth Amendment forbids the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it" and requires that prisoners "know the fact of their impending execution and the reason for it." Id. at 422, 106 S. Ct. at 2608 (Powell, J., concurring). In Panetti, the Supreme Court revisited the competency standard and "clarified that the requisite 'awareness' or 'comprehension' required by Ford was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution." Ferguson, 716 F.3d at 1336 (citing Panetti, 551 U.S. at 935, 958–59, 127 S. Ct. at 2848, 2861–62). In sum, under Panetti and Ford the prisoner must rationally understand that he is going to be put to death and the reason why. See Ferguson, 716 F.3d at 1318.

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to this statute, is not reviewable by any other court"); Magwood v. State, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984) (concluding that it did not have jurisdiction over appeal under § 15-16-23 and declining to "creat[e] a right of appellate review contrary to the explicit language of the statute"). On this basis, we conclude that Mr. Madison properly exhausted the available state court remedies. See 28 U.S.C. § 2254(b)(1).

In Panetti, the Supreme Court rejected the "improperly restrictive" competency test articulated by the Fifth Circuit and held that a prisoner must rationally, as well as factually, understand the reasons for his execution. Panetti, 551 U.S. at 935, 959, 127 S. Ct. at 2848, 2862. The Fifth Circuit identified the relevant inquiry as whether a prisoner "is aware that he is going to be executed and why he is going to be executed." Id. at 956, 127 S. Ct. at 2860 (quotation omitted and alteration adopted). The Fifth Circuit concluded that a prisoner is competent if he is aware he committed a crime, that he will be executed, and that his crime is the stated reason for the execution. See id. The Supreme Court rejected this standard as inconsistent with Ford because it treated "a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution." Id. at 958, 127 S. Ct. at 2861. The Court explained that a prisoner's mental condition is relevant to the requisite "comprehension" or "awareness" if it "so impair[s] the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution." Id. (alterations adopted).

Although Panetti identifies the concept of "rational understanding" as the focus of the competency inquiry, the Court's opinion does not define the term. See id. at 959, 127 S. Ct. at 2862. But while Panetti declined "to set down a rule governing all competency determinations," id. at 960–61, 127 S. Ct. at 2862, it did plainly tell us what is insufficient. Panetti explicitly rejected a bare factual-awareness standard, holding that "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational

understanding of it." Id. at 959, 127 S. Ct. at 2862. In other words, it's not enough for the prisoner to merely recite the proffered reason for his execution. Instead, Panetti tells us we must look at the prisoner's own "concept of reality," id. at 958, 127 S. Ct. at 2861—particularly as it relates to the relationship between his crime and his execution. See id. at 960, 127 S. Ct. at 2862 ("[A] severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."). After Panetti, it's therefore clear that in order to determine competency, a court must examine whether a prisoner's mental condition prevents him from appreciating the link between his crime and his punishment.[9] See Panetti, 551 U.S. at 960–62, 127 S. Ct. at 2862–63; Ferguson, 716 F.3d at 1318 (stating that the analysis of "mental competency to be executed involves [the prisoner's] understanding of the connection between his

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[9] The rationales supporting the prohibition on the execution of people who are not competent underscore that the relevant inquiry focuses on the prisoner's subjective understanding of the reason for his execution. Justice Powell's opinion in Ford was concerned with the prisoner's capacity to experience retribution, 477 U.S. at 422, 106 S. Ct. at 2608 (Powell, J., concurring) ("If the [prisoner] perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied."), and the prisoner's ability "to prepare, mentally and spiritually, for [] death," id. at 421, 106 S. Ct. at 2607. The Ford majority spoke of the "fear and pain" that people who do not understand the reason for their execution face. Id. at 410, 106 S. Ct. at 2602. The Court explained that "civilized societies" feel "natural abhorrence" at killing people like this because they lack the "capacity to come to grips with [their] own conscience or deity." Id. at 409, 106 S. Ct. at 2601.

execution and the crimes for which he is going to be executed").

B. THE ALABAMA COURT UNREASONABLY DETERMINED THE FACTS

Mr. Madison argues that the state trial court's decision was based on an unreasonable determination of the facts because the court refused to consider undisputed evidence of his diagnosed dementia and corresponding memory deficits. Mr. Madison points out that the trial court's order never mentions his dementia diagnosis or engages in any analysis about how that diagnosis or his memory impairment impacts his ability to rationally understand the reason for his execution. The State responds that the trial court considered all of the evidence and simply relied on Dr. Kirkland's testimony to determine that Mr. Madison is competent. But our review of Dr. Kirkland's testimony leads us to conclude that it is insufficient to support the trial court's competency determination. Indeed, Dr. Kirkland's testimony is not relevant to the competency inquiry called for by the Supreme Court.

As we have discussed, Panetti requires a court to examine whether the prisoner, due to a mental disorder, lacks a rational understanding of the connection between his crime and his execution. The only evidence presented to the state court on this question was the testimony and reports of Dr. Kirkland and Dr. Goff. That evidence shows that Mr. Madison suffers from a serious mental disorder that has left him unable to recall his capital offense and that Mr. Madison believes, to the best of his ability, he didn't kill anyone.

First, it is clear that Mr. Madison has a serious mental condition. The experts agreed that Mr. Madison's strokes have impaired his cognitive functioning. Dr. Goff diagnosed Mr. Madison with a vascular neurological disorder (vascular dementia) characterized by retrograde amnesia. Dr. Kirkland did not dispute that diagnosis. The experts agreed there was no indication that Mr. Madison was malingering.

Second, on the record before us it is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense. Dr. Goff specifically evaluated Mr. Madison's cognitive abilities, including his memory, and found that while Mr. Madison is able to remember certain things from his past, he has no memory of the murder. The State presented no evidence to rebut this finding. Indeed, the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime, and the State concedes that Dr. Kirkland never testified on this particular point. Rather, Dr. Kirkland testified that Mr. Madison "was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense." (Emphasis added.) Dr. Kirkland's report reflected only that Mr. Madison was able to discuss certain details about his youth, such as where he attended elementary and high school, and the history of the litigation challenging his conviction and sentence. These statements do not show that Mr. Madison can remember the event that matters here—his capital offense. Dr. Goff's

testimony that Mr. Madison does not remember committing the murder is therefore unrefuted.[10]

Third, the record shows that, as a result of his mental disorder, Mr. Madison does not rationally understand the connection between his crime and his execution. Dr. Goff's evaluation focused on Mr. Madison's understanding of the reason for his execution, and Dr. Goff used a checklist of interview questions specifically designed to assess a prisoner's competency to be executed.[11] On the basis of this evaluation, Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished or the act for which he is to be punished. Dr. Goff's testimony addressed the core question

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[10] The state trial court made no explicit finding as to whether Mr. Madison could remember his offense. In any event, such a finding would not have been reasonable in light of the evidence presented at the state court proceeding because there was no testimony or evidence to support it.

[11] Dr. Goff used an interview checklist published in the Journal of Behavioral Sciences and the Law. See Zapf, P.A., Boccaccini, M.T., & Brodsky, S. L., Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist, 21 Behav. Sci. & L. 103 (2003). The checklist is divided into four sections: (1) understanding the reasons for punishment, (2) understanding the punishment, (3) appreciation and reasoning (in addition to simple factual understanding), and (4) ability to assist the attorney. Id. at 114. In his report, Dr. Goff noted that he attempted to complete the first section of the checklist, which focuses on the individual's understanding of the crime and other conviction-related information. Id.; see also id. at 117–18. Dr. Goff was not able to follow the suggested outline because of Mr. Madison's "tendency to repeat himself and his tendency to go off on tangents and start talking about other issues."

posed by Panetti—whether Mr. Madison rationally understands that his crime is the reason for his execution. In stark contrast, Dr. Kirkland's report and testimony include no indication that he evaluated whether Mr. Madison understood this connection at all.[12] Dr. Kirkland didn't refute any of Dr. Goff's conclusions. Instead, the conclusions in Dr. Kirkland's report appear to rely exclusively on Mr. Madison's ability to discuss the history of his case.

Dr. Kirkland's testimony at the competency hearing demonstrates that he simply wasn't looking at the right issues. Dr. Kirkland summarized his relevant findings as follows: First, "[Mr. Madison] was able to discuss his case with me in detail, in particular, each returned trip to [the sentencing] court"; and, second, "he was able to discuss the posture of the case at this point in an accurate fashion, and indicated that he knew what the original sentence was as well as why the case has been tried three times." But this evidence shows only that Mr. Madison understands the procedural history of his case and is aware that he has been sentenced to death. Demonstrating this distinction, when the trial court asked Dr. Kirkland whether Mr. Madison understood that the State was seeking retribution for an act Madison had committed in the past, Dr. Kirkland replied, "Certainly. [Mr. Madison] talked specifically about [a] death sentence versus life without [parole] in the original trial and the first retrial and in the second." That's all Dr. Kirkland

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[12] Although Dr. Kirkland has performed a significant number of competency evaluations in other contexts (e.g., competency to stand trial), Mr. Madison was the first prisoner he evaluated for his competency to be executed.

said. Mr. Madison's ability to distinguish between a death sentence and a life sentence does not show—or even suggest—that he understands that his death sentence means he will be put to death because of the crime he committed.

The critical fact underlying the state court's competency decision was that Mr. Madison rationally understands "that he is going to be executed because of the murder he committed." (Emphasis added.) But nothing in the record supports this finding.[13] Dr. Kirkland never testified that Mr. Madison understands that his execution is connected to the murder he committed. And none of Dr. Kirkland's testimony otherwise bears on Mr. Madison's ability to

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[13] The dissent says that Dr. Kirkland's testimony supports the state court's competency finding. We respectfully disagree. No testimony from Dr. Kirkland bears on Mr. Madison's ability to understand the connection between the murder he committed in 1985 and his execution. Dr. Kirkland's testimony that Mr. Madison understands his legal appeals and can discuss legal theories with his attorneys could perhaps demonstrate that Mr. Madison is competent to stand trial. See Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975) (competency to stand trial requires that the defendant have "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense"). But, as we've explained, it does not show that he is competent to be executed.

Although the dissent portrays the state court as reasonably choosing between two experts, this record does not contain conflicting expert testimony on the critical issue of whether Mr. Madison rationally understands the connection between the murder he committed and his execution. As a result, this is not a situation in which the state court simply credited one expert over another. Cf. Ferguson, 716 F.3d at 1339–40 (concluding that petitioner was not entitled to relief under § 2254(d), in part because the state court merely credited the testimony of some experts over others).

understand the connection between his past crime and his execution. The only evidence in the record that does address this issue demonstrates that, due to his serious mental disorder, Mr. Madison does not understand the connection between his crime and his execution. Dr. Goff's testimony showed that Mr. Madison cannot remember his crime, doesn't believe he committed murder, and therefore cannot rationally connect his crime to his execution. Dr. Kirkland didn't talk about Mr. Madison's ability to make this connection at all. As a result, the state court's finding that Mr. Madison "has a rational[] understanding . . . that he is going to be executed because of the murder he committed" is not supported by the record and is therefore plainly unreasonable.[14] See Burgess v. Comm'r, Ala. Dep't of Corr., 723 F.3d 1308, 1319 (11th Cir. 2013) (holding state court's ruling was an unreasonable determination of the facts because the record was "insufficient to support its conclusions"); Green v.

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[14] Although the Supreme Court has "not yet defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," Brumfield, 135 S. Ct. at 2282 (quotation omitted), and neither has this Court, Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1293 n.4 (11th Cir. 2015) ("The interaction between [§ 2254](d)(2) and (e)(1) . . . is an open question in this circuit."), Mr. Madison has met his burden under either standard. Nothing in the record supports the state court's factual determination. And the unrebutted expert testimony on this point shows the exact opposite. We therefore conclude Mr. Madison has produced clear and convincing evidence that he does not rationally understand the connection between his past crime and his execution. See Ward v. Hall, 592 F.3d 1144, 1178 (11th Cir. 2010) (concluding habeas petitioner had rebutted the presumed correctness of the state court's factual finding when "there [was] no contrary evidence in the record to refute" the petitioner's evidence).

Nelson, 595 F.3d 1245, 1251 (11th Cir. 2010) (concluding the state court's determination had "no basis in th[e] record" and was therefore unreasonable under § 2254(d)(2)). We therefore conclude that the state court's decision that Mr. Madison is competent to be executed rests on an unreasonable determination of the facts.

C. THE ALABAMA COURT UNREASONABLY APPLIED THE LAW

This record also leads us to conclude that the state court's decision involved an unreasonable application of clearly established federal law. The state court cited Panetti in support of its finding that Mr. Madison was competent to be executed. But, considering the evidence presented at the competency hearing, this finding "cannot be reconciled" with any reasonable application of Panetti. 551 U.S. at 953, 127 S. Ct. at 2858.

The State argues that Mr. Madison cannot succeed under AEDPA because Ford and Panetti didn't hold that the specific mental conditions relevant here, dementia and related memory loss, "definitively preclude rational understanding." Rather, the State suggests that only a prisoner suffering from gross delusions can show incompetency under Panetti.[15] This is not consistent with our reading of Ford and Panetti. Neither case says a prisoner must suffer from delusions in order

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[15] At oral argument, the State argued that a prisoner who has severe dementia that doesn't result in delusions but has completely obliterated his memory would be competent to be executed because the mere fact that a prisoner doesn't suffer from delusions means that he can form the rational understanding required by Panetti.

to be deemed incompetent. Indeed, such a narrow and rigid rule would be inconsistent with the principles underlying those decisions. The Supreme Court was concerned with a much broader question. That is, whether a prisoner's "current mental state [] bar[s] his execution" under the Eighth Amendment, Panetti, 551 U.S. at 934, 127 S. Ct. at 2848, by preventing him from "comprehending the meaning and purpose of the punishment," id. at 960, 127 S. Ct. at 2862.

Panetti requires a court making a competency determination to analyze the prisoner's understanding of the connection between his crime and his execution. See Panetti, 551 U.S. at 960, 127 S. Ct. at 2862 (focusing on the prisoner's "awareness of a link between [his] crime and [his] punishment"); see also Ferguson, 716 F.3d at 1336. And the Supreme Court has told us that the prisoner's own "concept of reality" is relevant to this determination. See Panetti, 551 U.S. at 958–60, 127 S. Ct. at 2861–62. Courts may not conflate a prisoner's mere awareness of the stated reason for his execution with a rational understanding of that reason—"[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." Id. at 959, 127 S. Ct. at 2862.

In short, the Supreme Court has made it clear that to determine competency, a court must examine the prisoner's understanding of the connection between his crime and his execution, taking into account any impairments resulting from a mental disorder. See Panetti, 551 U.S. at 958–60, 127 S. Ct. at 2861–62. The state court didn't do that here. The court never considered the impact of Mr. Madison's

memory loss or his belief that he never killed anyone on his ability to make the required connection between his crime and his execution. And the evidence the trial court did consider—namely, Dr. Kirkland's testimony—did not address Mr. Madison's understanding of this connection at all. Therefore, under any reasonable interpretation of Panetti, this record cannot support the trial court's finding that Mr. Madison is competent to be executed.

A closer look at the competency standard rejected by the Supreme Court in Panetti as "too restrictive" makes this obvious. Id. at 956, 127 S. Ct. at 2860. The Fifth Circuit's test before the Court in Panetti considered a prisoner competent if he was aware of committing the underlying crime, aware that he will be executed, and aware that the reason the state has given for his execution is the underlying crime. See id. But, even under this standard, Mr. Madison cannot be deemed competent. The record shows that, due to his dementia, he isn't aware that he committed the underlying crime—he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone. Panetti clearly established that the Fifth Circuit's "bare and narrow factual-awareness" test was too restrictive, see Ferguson, 716 F.3d at 1335, so this trial court's determination that Mr. Madison is competent is wholly inconsistent with Panetti.

We are aware that the Supreme Court recognized "a concept like rational understanding is difficult to define." Panetti, 551 U.S. at 959, 127 S. Ct. at 2862. But Panetti plainly requires courts making competency determinations to analyze whether the prisoner understands "the connection between his

execution and the crimes for which he is going to be executed." Ferguson, 716 F.3d at 1318. The state court failed to do that here. If a court can find a prisoner competent to be executed without evidence that he understands why he is being punished, Panetti doesn't stand for much.

AEDPA requires us to ask whether "some fairminded jurists could agree," with the state court's competency determination in light of the Panetti standard and the evidence presented to the state court. See Ferguson, 716 F.3d at 1340 (quotation omitted). Given the unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes that he has not killed anyone—as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution—the answer here is no. A person cannot rationally understand why he is being killed if, according to his "concept of reality," he never committed a crime. Panetti, 551 U.S. at 958, 127 S. Ct. at 2861. A finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable.

V. CONCLUSION

Because the Alabama trial court unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law, we do not owe the state court's finding that Mr. Madison is competent to be executed deference under AEDPA. We therefore review the merits of Mr. Madison's claim de novo. See Adkins v. Warden, Holman CF,

710 F.3d 1241, 1255 (11th Cir. 2013); Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1353 (11th Cir. 2011) .

Under Panetti there are two relevant questions. First, whether Mr. Madison rationally understands the connection between his crime and his execution—that is, whether he understands that he is going to be executed because of the murder he committed. Ferguson, 716 F.3d at 1342. And second, whether Mr. Madison understands that he will die when he is executed. Id. It is undisputed that Mr. Madison understands that his execution will result in his death. But for the second question, the evidence shows that, due to his dementia and related memory impairments, Mr. Madison lacks a rational understanding of the link between his crime and his execution. Mr. Madison may have been told that he is being executed because of the murder he committed, but he doesn't remember his capital offense, and according to his perception of reality he never committed murder. This record is without evidence that Mr. Madison is malingering, and there is no finding by the trial court to that effect. A person does not rationally understand his punishment if he is simply blindly accepting what he has been told. See Panetti, 551 U.S. at 959, 127 S. Ct. at 2862 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."); see also Ferguson, 716 F.3d at 1344 (Wilson, J., concurring) ("Panetti requires more than just a prisoner's ability to regurgitate the State's announced reason for his punishment or to recite the facts attendant to his execution."). Dr. Goff testified that Mr. Madison does not understand why he is being executed or the act for which he is being punished. None of the

evidence at the competency hearing belies Dr. Goff's testimony. We therefore conclude that Mr. Madison is incompetent to be executed.

REVERSED.

JORDAN, Circuit Judge, dissenting.

After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time for his murder of a police officer three decades ago. *See generally Panetti v. Quarterman*, 551 U.S. 930, 958 (2007) (explaining that a state cannot put to death a prisoner who "cannot reach a rational understanding of the reason for the execution"). But Congress has chosen to generally prohibit federal courts from adjudicating constitutional claims anew on habeas review, so Mr. Madison's competency (or lack thereof) is not our initial call to make. Under the restrictive standards we are required to apply, *see* 28 U.S.C. § 2254(d), and given the way we interpreted *Panetti* in *Ferguson v. Secretary*, 716 F.3d 1315 (11th Cir. 2013), I do not think Mr. Madison can obtain habeas relief.

I

Mr. Madison asserts that the state trial court's decision is not entitled to AEDPA deference because Alabama law does not provide for any appellate review. *See* Br. for Appellant at 20–26. But he did not present this theory to the district court, and normally we do not entertain arguments raised for the first time on appeal. *See, e.g., Landers v. Warden*, 776 F.3d 1288, 1296–97 (11th Cir. 2015). I understand that we have discretion to address an unpreserved claim, *see, e.g., Burns v. Secretary*, 720 F.3d 1296, 1303 n.2 (11th Cir. 2013) (citing cases), but I would not exercise such discretion here because Mr. Madison never sought a certificate of appealability on this issue.

II

Mr. Madison argues that the state trial court improperly applied a competency standard which required him to show that he suffered from a mental illness, and refused to consider his dementia and corresponding memory deficits. As a result, he says, the state trial court's decision was contrary to, and an unreasonable application of, *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti*. *See* Br. for Appellant at 26–31. I am not convinced by this argument.

First, the state trial court cited both *Ford* and *Panetti* in its order. And it correctly quoted *Panetti* for the proposition that "[a] prisoner's awareness of the [s]tate's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter." D.E. 8-2 at 4 (quoting *Panetti*, 551 U.S. at 959) (internal quotation marks omitted).

Second, although I strongly disagree with Alabama's contention that mental illness is a necessary (though not sufficient) prerequisite for a finding of incompetency under *Ford* and *Panetti*—I can imagine a number of scenarios where lack of competency is not due to mental illness—Mr. Madison told the state trial court at the evidentiary hearing that the applicable competency standard was the one approved in *Weeks v. Jones*, 52 F.3d 1559, 1568 (11th Cir. 1995), i.e., the standard found in Standard 7-5.6(b) of the American Bar Association's Criminal Justice Mental Health Standards (which itself refers to "mental illness"), as modified by *Panetti*. Mr. Madison explained the standard as follows:

> [T]his [c]ourt would have the obligation of determining whether Mr. Madison, *as a result of mental illness* or mental retardation, cannot understand the nature of the pending proceeding, what he . . . was tried for, the reason for the punishment, or the nature of the punishment. And I'm reading from *Weeks*. . . . The convict is also incompetent if, *as a result of mental illness* or retardation, the convict lacks sufficient capacity to recognize or understand any fact which may exist which would make the punishment unjust or lawful, or lacks the ability to convey such information to counsel or the [c]ourt. Obviously, there's the United States Supreme Court decision in *P[a]netti* as well, which describes the standard as one of having a rational understanding of the proceedings and not just a factual understanding of what's happening.

D.E. 8-1 at 7–8 (emphasis added). Because Mr. Madison urged the state trial court to use the *Weeks* standard, which referred to mental illness, he cannot now complain that it did as he asked. *See, e.g.*, *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 65–66 (11th Cir. 2013) (concluding that party which argued for a certain standard in the district court invited error and could not request a different standard on appeal).

III

Mr. Madison contends that the state trial court erred in finding him competent to be executed. This

claim is a difficult one, but at the end of the day I do not believe that Mr. Madison can overcome the presumption of correctness afforded to the state trial court's factual finding by clear and convincing evidence.

A

A state can, consistent with the Due Process Clause of the Fourteenth Amendment, presume that a defendant is competent, and place the burden on him to show otherwise by a preponderance of the evidence. *See Medina v. California*, 505 U.S. 437, 446–53 (1992); *Cooper v. Oklahoma*, 517 U.S. 348, 355–56 (1996). Unfortunately, the Alabama statute at issue here, Ala. Code § 15-16-23, is silent on who has the burden of proof as to competency, and because the statute does not allow for appellate review of a trial court's competency ruling, *see, e.g.*, *Weeks v. State*, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995), there are no reported decisions in Alabama which address the burden of proof. Our cases involving § 15-16-23 are also silent on that issue. *See, e.g., Magwood v. Smith*, 791 F.2d 1438, 1445–47 (11th Cir. 1986).[1]

In its order, the state trial court explained that the parties had agreed that Mr. Madison had the burden of showing, by a preponderance of the

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[1] One of our opinions, *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992), says— without citing any authority—that a "petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or incompetency by a preponderance of the evidence." This language, however, is dicta because the *James* panel only addressed whether the Florida petitioner in that case had done enough to obtain an evidentiary hearing in the district court.

evidence, that he is incompetent and cannot be executed. *See* D.E. 8-2 at 4. When he filed his habeas corpus petition, Mr. Madison did not take issue with the state trial court's statement. *See* D.E. 1 at 15–16. And in his brief here Mr. Madison does not quarrel with the state trial court's allocation of the burden of proof. It seems to me, therefore, that our § 2254(d)(2) analysis must proceed with the understanding that in the state trial court Mr. Madison bore the burden of establishing that he is incompetent. That necessarily means, of course, that Alabama did not have to establish that Mr. Madison is competent.[2]

B

The state trial court's determination that Mr. Madison is competent under *Panetti* constitutes a finding of fact. *See, e.g., Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (pre-AEDPA); *Lawrence v. Secretary*, 700 F.3d 464, 476–77 (11th Cir. 2012) (post-AEDPA). Under AEDPA that finding of fact is "presumed to be correct," and Mr. Madison shoulders the burden of rebutting that "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Clear and convincing evidence, as we have explained, is "an intermediate standard

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[2] Some Alabama cases, in addressing competency to stand trial under Ala. Code § 15-16¬22, have explained that the defendant bears an initial burden of producing evidence that he is incompetent, but once he does so the state "must then prove that [he] is competent." *Lackey v. State*, 615 So. 2d 145, 152 (Ala. Crim. App. 1992). Mr. Madison has not tried to place the burden on Alabama even though dicta in *Magwood v. State*, 689 So. 2d 959, 973 (Ala. Crim. App. 1996), suggests that "[t]he standards and guidelines concerning [§ 15-16-23] are analogous to those concerning the determination of competence to stand trial established in § 15-16-22[.]"

of proof that lies between proof by a preponderance of the evidence and proof beyond a reasonable doubt." *Fults v. GDCP Warden*, 764 F.3d 1311, 1314 (11th Cir. 2014).

Significantly, we do not apply *Panetti* and *Ford* in a vaccum. In *Ferguson*, we explained that *Panetti*, though rejecting a "bare and narrow factual-awareness standard[,] . . . did not abrogate or otherwise reject the awareness standard articulated by Justice Powell [in *Ford*], nor did it impose a new, more rigorous standard for assessing competency to be executed." 716 F.3d at 1335. "Instead, the Supreme Court in *Panetti* generally accepted the proposition that *Ford* had laid down the 'substantive federal baseline for competency,' and it clarified that the requisite 'awareness' or 'comprehension' required by *Ford* was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution." *Id.* at 1335–36 (citation omitted). "What the Supreme Court rejected in *Panetti* was an overly narrow interpretation of *Ford* that deems a prisoner's mental illness and delusional beliefs irrelevant to whether he can understand the fact of his pending execution and the reason for it." *Id.* at 1336.

In *Ferguson* we also pointed out that *Panetti* declined to provide a definition of the phrase "rational understanding," except to say that "'normal' or 'rational' in this context does not mean what a layperson understands those terms to mean." *Id.* at 1337 (citation omitted). And "[b]ecause the Supreme Court refrained from clearly establishing in *Panetti* any definition of rational understanding," we said

that "state courts can hardly be faulted for not clearly defining it themselves." *Id.*

There is, undoubtedly, evidence in the record which shows that Mr. Madison—given his thalamic stroke, ensuing vascular dementia, and numerous other significant medical problems—is incompetent. Dr. John Goff, for example, concluded that Mr. Madison is not competent. Mr. Madison, according to Dr. Goff, does not remember who his victim was. *See* D.E. 8-1 at 59. And although Mr. Madison realizes that he is going to be executed, Dr. Goff believes that he does not understand why due to the loss of episodic (i.e., event-specific) memory. *See id.* at 48, 55. Dr. Goff reached his conclusion after examining Mr. Madison, administering a number of tests to him, interviewing other individuals who interacted with him, and reviewing his medical history. *See id.* at 40–53. I personally find Dr. Goff's opinion persuasive and would credit it if I were the factfinder, but that is not my role. *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").[3]

What matters here is that there is evidence in the record which supports a finding that Mr. Madison is competent. Dr. Karl Kirkland, following an examination of Mr. Madison and a review of his

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[3] I do note, however, that Dr. Goff was not aware that Mr. Madison had never admitted that he was guilty of murder, and had tried to establish that he acted in self-defense. *See* D.E. 8¬1 at 65; *Madison v. State*, 718 So.2d 90, 97 (Ala. Crim. App. 1997).

medical records, concluded that he is competent despite a decline in cognitive functioning. *See* D.E. 8-1 at 17. As set forth in his report, which was admitted as Court Exhibit 1 at the state court evidentiary hearing, Dr. Kirkland reached his conclusion based on findings that Mr. Madison (a) does not have "psychosis, paranoia, or delusion;" (b) remembers his appeals and has a strong belief that his state trial judge should have recused himself; (c) understands the "exact posture of his case at this point;" (d) is "able to accurately discuss many aspects of his case;" and (e) "appears to be able to have a rational understanding of the sentence, the results or effects of the sentence, and to still be able to discuss defense and legal theories with his attorneys." D.E. 8-3 at 9–11. At the evidentiary hearing, Dr. Kirkland testified that Mr. Madison is "able to discuss the posture of the case at this point in an accurate fashion," and is "able to be cognizant, aware . . . where he is with the case." D.E. 8-1 at 16–17. He also explained that Mr. Madison knows about his pending execution, and realizes that he has two possible sentences: execution and life without parole. *Id.* at 23, 25–26.

The state trial court found, after considering the conflicting evidence, that Mr. Madison failed to prove by a preponderance of the evidence that he is incompetent. *See* D.E. 8-2 at 10. The state trial court accepted the testimony of Dr. Kirkland as to Mr. Madison's understanding of the situation, and specifically found that Mr. Madison "has a rational[ ] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[ ] understanding that the

[s]tate is seeking retribution and that he will die when he is executed." *Id.*

I acknowledge that Dr. Kirkland may not have performed the most exhaustive of examinations, may not have asked the best questions, and may not have provided the most pristine opinion. But that is not dispositive because Alabama did not have the burden of proof. Given that Mr. Madison bore the burden of establishing his incompetency, and that the state trial court considered but implicitly rejected Dr. Goff's opinion, *see Hodges v. Attorney General*, 506 F.3d 1337, 1347 n.2 (11th Cir. 2007), I do not believe Mr. Madison can overcome the presumption of correctness given to that court's competency finding by clear and convincing evidence. *See Ferguson*, 716 F.3d at 1339–42; *Fults*, 764 F.3d at 1314, 1319–21. Stated differently, the state trial court's finding was not "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).[4]

IV

Respectfully, and reluctantly, I dissent.

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[4] Things might be different if Alabama had the burden of demonstrating that Mr. Madison is competent. But, as the case was litigated in the state court, it did not.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNON MADISON,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION**
v.	)	**NO. 16-00191-KD-M**
	)	
JEFFERSON S. DUNN, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

ORDER

This action is before the Court on Petitioner Vernon Madison's petition for writ of habeas corpus (Doc. 1), motion for stay of execution (Doc. 2), Respondent Jefferson S. Dunn's motion to dismiss pursuant to 28 U.S.C. § 2244(b) (Doc. 6), Respondent's motion to dismiss for lack of exhaustion (Doc. 7), Respondent's brief in opposition to Madison's petition (Doc. 9), Respondent's opposition to the motion for stay (Doc. 10), and Madison's response to the motions to dismiss (Doc. 12). Upon consideration and for the reasons set forth herein, Respondent's motion to dismiss Claim One for lack of exhaustion is DENIED, Madison's petition for writ of habeas corpus is DENIED, his motion for stay of execution is DENIED and Respondent's

motion to dismiss Claim Two pursuant to 28 U.S.C. § 2244(b) and for failure to exhaust is GRANTED.

I. Background

In May 1985, Petitioner Madison was indicted for capital murder for killing Julius Schulte, a police officer with the Mobile, Alabama Police Department. In September 1985, a jury found Madison guilty of capital murder. He was convicted and sentenced to death. His first conviction and death sentence were set aside. *Madison v. State*, 545 So.2d 94, 99–100 (Ala.Crim.App.1987). He was tried and again convicted and sentenced to death. The Alabama Court of Criminal Appeals reversed this decision. *Madison v. State*, 620 So.2d 62, 63 (Ala.Crim.App.1992). Madison was tried a third time and again convicted of capital murder and sentenced to death. *Madison v. State,* 718 So.2d 90, 94 (Ala. Crim. App. 1997). His conviction and sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals, *id.* at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So.2d 104, 108 (Ala. 1998). The petition for writ of certiorari was denied. *Madison v. Alabama*, 525 U.S. 1006, 119 S.Ct. 521 (1998). Madison's petition for state post-conviction relief was dismissed by the state trial court and the dismissal was affirmed. *Madison v. State*, 999 So.2d 561 (Ala.Crim.App. 2006).

Madison then filed his first petition for writ of habeas corpus under 28 U.S.C. § 2254 in this district court. The petition was denied. *Madison v. Allen*, 2011 WL 1004885 (S.D. Ala. March 21, 2011). The Eleventh Circuit Court of Appeals reversed and remanded with instructions regarding Madison's *Batson* challenge. *Madison v. Comm'r, Ala. Dep't of*

Corr., 677 F.3d 1333 (11th Cir. 2012) (reh'g. denied *Madison v. Comm'r, Ala. Dep't of Corr.*, 484 Fed. Appx. 467 11th Cir. 2012) (table)) (cert. denied *Thomas v Madison*, 133 S. Ct. 617 (2012)). On remand, this district court denied his petition. *Madison v. Allen*, 2013 WL 1776073 (S.D. Ala. Apr. 25, 2013). The decision was affirmed. *Madison v. Comm'r, Alabama Dep't of Corr.*, 761 F.3d 1240 (11th Cir. 2014) (cert. denied *Madison v. Thomas*, 135 S. Ct. 1562 (2015) (reh'g. denied *Madison v. Thomas*, 135 S. Ct. 2346 (2015)).

In January 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date. (Doc. 2, p. 3) Madison then filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, wherein he moved the trial court to stay his execution on basis that he is incompetent to be executed (*id.*). The Code provides for suspension of execution of the sentence of death of a convicted person, if "at anytime before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane[.]" Ala. Code § 15-16-23. Madison requested a delay in setting the execution date until his competency claim was adjudicated. However, the Supreme Court of Alabama set his execution for Thursday, May 12, 2016 (*Id.*).

The Mobile County Circuit Court found that Madison had made a preliminary showing of incompetency, ordered an evaluation, and held a hearing on April 14, 2016. (Doc. 2, p. 4) After post-trial briefs were filed, the state court denied his § 15-16-23 petition on April 29, 2016. The circuit court found that Madison had "not carried his burden by a

preponderance of the evidence, that it is more likely than not, that he, Madison, does not rationally understand the punishment he is about to suffer and why he is about to suffer it." (Doc. 7-2; *Madison v. State of Alabama*, Civil Action 1985-001385.80 (Document 43) (Circuit Court of Mobile County, Alabama, Apr. 29, 2016)).

Madison then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, in this court. (Doc. 1) As to his competency, Madison alleges that he has experienced multiple strokes including a recent thalamic stroke in January 2016, major vascular neurological disorders, vascular dementia, and other serious medical conditions including diabetes and hypertension. He further alleges that these medical problems have damaged his brain and left him with declining cognitive function, diminished mental capacity, severe memory deficits, dementia, slurred speech, blindness, incontinence, and an inability to walk. (Doc. 1)

Based on his mental incompetence, Madison asserts that he does not have an independent recollection of the facts of his offense and does not have a rational understanding of why the State is seeking to execute him. Therefore, according to Madison, the State would violate the Eighth Amendment's prohibition against cruel and unusual punishment as provided in *Ford v. Wainwright*, 477 U.S. 399 (1986) should it carry out his execution. The court has labeled this Claim One.

Madison also alleges that because he suffers from dementia, he is in a class of people for whom execution is categorically unconstitutional. Madison argues that executing persons with diminished

capacity would not serve the goals of the death penalty, *i.e.*, retribution or deterrence and would be unconstitutional as set forth in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). The court has labeled this Claim Two.

Madison also filed a motion to stay his execution. (Doc. 2) Madison argues that a stay of execution should be granted because he has a non-frivolous claim of constitutional error that cannot be resolved on the merits before the scheduled date of execution.

II. Exhaustion of the *Ford* claim (Claim One)

Title 28 United States Code § 2254 requires that petitioners seeking relief in federal court must first exhaust available state remedies. Specifically, § 2254(b)(1) states:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

Madison argues that, pursuant to Ala. Code § 15-16-23, there is no appellate review of the state court's

decision available in the Alabama state courts. Thus, he contends that he has exhausted his state remedies. In support, he relies on *Weeks v. State*, 663 So. 2d 1045 (Ala. Crim. App. 1995) and *Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). Both cases held that § 15-16-23 decisions were not reviewable. The statutes states:

> If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence to the time fixed in the order; and, if it subsequently is made to appear to the court that such convict, the execution of the sentence of whom has thus been suspended, is restored to sanity, the trial court shall forthwith have another order entered ordering and commanding the execution of the judgment and sentence originally awarded in said court at a time fixed in such order. **This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge.** No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict. This section shall not prevent the judge or court

> from impaneling a jury to try the question of insanity or from examining such witnesses as he may deem proper for guidance.

Ala. Code § 15-16-23 (emphasis added).

Respondent argues that Madison has failed to exhaust his state remedies because the state court's decision made pursuant to § 15-16-23 is an appealable decision, which Madison has failed to appeal. Respondent points out that Ala. Code § 15-1-1, which pertains to §15-1623, states: "Any provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by rules of practice and procedure adopted by the Supreme Court of Alabama." Ala. Code § 15-1-1. (Doc. 7 at 2) Ala. R. Crim. P. 32.4 states:

> A proceeding under this rule displaces all post-trial remedies except post-trial motions under Rule 24 and appeal. **Any other post-conviction petition seeking relief from a conviction or sentence shall be treated as a proceeding under this rule.** Proceedings under this rule shall be governed by the Rules of Criminal Procedure, except that the trial court in its sole discretion may allow the taking of depositions for discovery or for use at trial.

Ala. R. Crim. P. 32.4 (emphasis added). Ala. R. Crim. P. 32.10(a) states:

> Any party may appeal the decision of a circuit court according to the procedures of the Alabama Rules of Appellate Procedure to the Court of Criminal Appeals upon

> taking a timely appeal as provided in Rule 4, Alabama Rules of Appellate Procedure

Ala. R. Crim P. 32.10.

In the motion to dismiss for lack of exhaustion, citing *Ex Parte Cate*, 134 So.3d 870 (Ala. 2013), Respondent summarizes, "[i]n fact, when the Alabama Supreme Court reviewed § 15-16-22, a closely related 'cousin' to § 15-16-23 that pertains to competency evaluations prior to trial, the Alabama Supreme Court noted that these provisions were procedural in nature and that they must yield to the Alabama Rules of Criminal Procedure." (Doc. 7 at 3) From this, Respondent makes a novel argument that §15-16-23 is unenforceable because it must yield to the general appellate rules of criminal procedure.

Upon review of *Ex Parte Cate*, the court concludes that Respondent overstates its relevancy to the issue at hand. In *Ex Parte Cate*, the Alabama Supreme Court was faced with provisions in the Alabama Code and the Alabama Rules of Criminal Procedure that both addressed the procedure for ordering competency evaluations. The Alabama Supreme Court held, "Section 15–16–22(a) does not grant the trial court discretion to order a defendant to submit to a mental examination independent of the procedural framework of Rule 11.2(a)." 134 So. 3d at 875. For this pronouncement the Court referenced Ala. Code §15-1-1, which provides, [a]ny provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by the rules of practice and procedure adopted by the Supreme Court of Alabama." 134 So. 3d at 8753, n.3. However the Court concluded that the statute and the rule were not inconsistent: "The duty imposed by

[§] 15-16-22(a) upon the trial court to order a mental examination of a defendant is consistent with Rule 11.2(a)(2); § 15-16-22(a) does not expand the trial court's discretion beyond the limits established by Rule 11.2(a)." 134 So. 3d at 875.

In this case, § 15-1-1 is inapplicable because the subject matter of §15-16-23 is not addressed in a rule of practice and procedure adopted by the Supreme Court of Alabama. Section 15-16-23 prohibits any other court from reviewing the trial court's determination regarding suspension of execution under this section. In other words, no other court has jurisdiction to consider a petition for suspension of the execution or to review the decision of the trial court. The bar on review by other courts of § 15-16-23 decisions is a substantive rule, not procedural. In contrast, Ala. R. Crim. 32.10 governs who can appeal (any party) and how (using Alabama Rules of Appellate Procedure), it does not govern whether an issue is appealable. As the Alabama Supreme Court stated in *Ex parte Ward*, "[t]here are, however, some limitations on our authority to promulgate and effectuate rules. '[R]ules shall not abridge, enlarge or modify the substantive right of any party." Const. of 1901, amend. 328, § 6.11[.]'" 540 So. 2d 1350, 1351 (Ala. 1988) (internal citations omitted). Any rule allowing a petitioner to appeal a suspension of execution would be an enlargement of the limited substantive right granted in § 15-16-23 (to seek a stay from the trial court) and thus in violation of the Alabama Constitution. *See Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc.*, 895 So. 2d 225, 236 (Ala. 2004) ("[I]t is clear that § 6.11 envisions that this Court's power to promulgate rules of practice and procedure for all courts could

supersede legislatively enacted rules of practice and procedure, so long as the rules promulgated by this Court did not abridge, enlarge, or modify the substantive rights of any party, and subject to the right of the Legislature to change the court-adopted rules by a general act of statewide application.").

The court finds that the language of § 15-16-23 expressly provides that a determination made under this section is not appealable. The Alabama Court of Criminal Appeals has held the same. *Weeks v. State*, 663 So. 2d at 1046[1] ("This case is governed by § 15-16-23 and this court's application of that statute in *Magwood*. The statute clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court."). Accordingly, Madison has exhausted his state remedies under § 15-16-23 as to Claim One. Thus, Respondent's motion to dismiss the petition for writ of habeas corpus for lack of exhaustion as to Claim One (Doc. 7) is DENIED and his opposition to the motion to stay (Doc. 10) based upon this same argument is OVERRULED.

The court acknowledges that this is Madison's second habeas petition and that he brings a *Ford v.*

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[1] In Weeks v. State, the Alabama Court of Criminal Appeals quoted its previous decision in Magwood v. State, which expanded upon the reasoning behind Ala. Code §15-16-23 as follows: "It is interesting to note that the legislature provided that the order of the trial court '... shall not be reviewed or revised by or renewed before any court or judge. No court or judge in this state shall have the power or the right to suspend the execution of sentence of any other court of record on account of the insanity of the convict.' This provision was obviously necessary if any sentence of execution is ever to be carried out. Otherwise, a person awaiting execution.

Wainwright claim for the first time. However, Madison's *Ford v. Wainwright* claim of incompetency to be executed (because of mental incompetence at the time of the scheduled execution) is not a claim that must be brought in an initial habeas petition. *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S. Ct. 2842, 2853 (2007) ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). Therefore, the court finds that the decision in *Panetti* provides jurisdiction as to Madison's *Ford*-based incompetency claim brought in his second habeas petition.

III. *Atkins* claim (Claim Two)

In his petition, Madison raises a second claim wherein he alleges that he falls within a class of persons, those with diminished mental capacity caused by dementia, for whom there is a categorical ban on the death sentence based upon the Eighth Amendment citing *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). (Doc. 1, ¶ 31-34, p. 19-20) In the motion to stay, Madison argues that his execution should be stayed because the confluence of the line of cases following *Atkins* and *Roper* dictates that he falls within this protected category of persons and his execution would be unconstitutional. (Doc. 2, p. 10-12)

Respondent moves to dismiss this second claim pursuant to 28 U.S.C. § 2244(b) (Madison failed to obtain authority from the Court of Appeals for the Eleventh Circuit before bringing his second claim in

a second habeas petition) and because Madison failed to fairly present the claim and exhaust his remedies in state court. (Doc. 6)

Title 28 U.S.C. § 2244(b)(3)(A) provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." An exception exists when the Supreme Court has expressly held that § 2244(b) does not apply to a specific type of claim, such as in *Panetti*, where the Supreme Court held that the "statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." 551 U.S. at 947. In *Ford v. Wainwright*, the Supreme Court held that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409–410. In *Panetti*, the Supreme Court held that a *Ford*-based claim is not ripe until the petitioner's date of execution has been set. 551 U.S. at 945-957. The Supreme Court concluded "that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe." 551 U.S. at 945.

Madison has not presented any support for a finding that an *Atkins* claim is in the "unusual posture" wherein the bar of § 2244(b)(3) is lifted, thus allowing Madison to file a second or successive habeas petition based on this claim without first obtaining approval from the appropriate court of

appeals. Moreover, *Panetti* is clear that the waiver of the restrictions in 2244(b) only applies to *Ford*-based claims. Consequently, the Eleventh Circuit must authorize this claim before Madison's petition may be considered by this court.

Additionally, Madison's second claim was never fully and fairly presented to the state court and is thus not exhausted. Madison's state court petition for suspension of his death sentence did not raise an argument based upon an extension of *Atkins* to include a category of persons with dementia. (Doc. 7-1) However, the state court transcript indicates that Madison argued at the hearing that dementia placed "him within a special category for people for whom execution is not appropriate" based on *Ford* and *Panetti,* but without mention of *Atkins.* (Doc. 8-1, p. 133, Hearing Transcript) Moreover, in a post-trial filing, Madison briefly references *Atkins* and the argument he now makes before this court. (Doc. 8-2, pp. 10-11) But the court finds that these brief references to the issue failed to give the trial court a fair opportunity to consider the issue. This is especially true due to the limited nature of the proceedings pursuant to § 15-16-23, *i.e.*, to determine the sanity of the petitioner. Thus, the claim has not been exhausted.

The Eleventh Circuit has stated that a prisoner cannot show "a substantial or significant likelihood of success on the merits" of an issue when that issue is "squarely foreclosed" by the exhaustion requirement found in 28 U.S.C. § 2254. *Gore v. Crews,* 720 F.3d 811, 815 (11th Cir. 2013). Therefore, the court finds that it lacks jurisdiction to consider Madison's *Atkins*-based claim in his habeas

petition and the *Atkins*-based argument in his motion to stay. Accordingly, the Respondent's motion to dismiss the second claim in the petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2244(b) (Doc. 6) is GRANTED and that claim is dismissed without prejudice. *Gore*, 720 F.3d at 815 ("If a petitioner fails to exhaust his state remedies, a district court must dismiss the petition without prejudice to allow for such exhaustion.").

IV. Injunctive relief as to the *Ford* claim (Claim One)

This court's authority to grant a stay of execution is found in 28 U.S.C. § 2251.[2] "A request for a stay of execution is a request for equitable relief." *White v. Jones*, 408 Fed. Appx. 293, 294-95 (11th Cir. 2011)[3] (citing *Williams v. Allen*, 496 F.3d 1210, 1212–13 (11th Cir. 2007) and *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 2104 (2006)).

Equitable principles to be considered include "(1) 'sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts,' (2) the plaintiff's satisfaction of 'all of the requirements for a stay, including a showing of a significant possibility of

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[2] "(a) In general -- (1) Pending matters.--A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251(a)(1).

[3] "Unpublished opinions are not considered binding precedent, but may be cited as persuasive authority." U.S. Ct. of App. 11th Cir. Rule 36-2.

success on the merits,' (3) the application of 'a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay,'[4] and (4) protection of the 'States from dilatory or speculative suits.'" *White*, 408 F. Appx. at 294-295 (citations omitted). "The strong interest of the State and the victim's families is in 'the timely enforcement of a sentence'", [ ] which acquires 'an added moral dimension' once post-trial proceedings finalize." *White*, 408 F. Appx. at 294-295 (quoting *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998) and *Arthur v. King*, 500 F.3d 1335, 1340 (11th Cir.2007)).

As to satisfaction of the requirements for a stay, the court may grant a stay of execution if the moving party shows a substantial likelihood of success on the merits, irreparable injury unless the stay issues, that the stay would not substantially harm the other party; and if issued, the stay would not be adverse to the public interest. *In re Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003) (citing *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987)).

Without dispute, Madison has met the second criteria. Madison will suffer irreparable injury if the stay is not granted. *In re Holladay*, 331 F.3d at 1177 (granting a stay of execution and finding that "the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident"). As to the

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[4] Madison filed his state petition within a month of the motion to set his execution date. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998). He filed his petition for habeas corpus in this court within a week of the state court's decision. Thus, the court finds this presumption inapplicable.

third criteria, substantial harm to other parties, the Eleventh Circuit Court of Appeals has explained that no substantial harm will "flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether the execution would violate the Eighth Amendment." *In re Holladay*, 331 F.3d at 1177. As to the fourth criteria, the Eleventh Circuit has acknowledged the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Jones v. Comm'r. Georgia Dep't of Corr.*, 812 F. 3d 923, 932 (11th Cir. 2016). The court is also mindful that "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983). However, it would not be adverse to the public interest to stay an execution that may violate the Constitution. Thus, the court turns to the first factor: whether there is a substantial likelihood of success on the merits.

Madison argues that there is a substantial likelihood that he will succeed on the merits of his claim because the Eighth Amendment prohibits his execution. The court disagrees and finds that not only is there not a substantial likelihood that Madison will succeed on the merits, but that the petition is due to be denied on the merits.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, this court does not have "plenary authority to grant habeas relief" but instead, the authority is "conditioned on giving deference to the states." *Jones v. Walker*, 496 F. 3d 1216, 1226 (11th Cir. 2007). Specifically, 28 U.S.C. § 2254 provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2).

"Pursuant to § 2254(d)(1). the phrase 'clearly established Federal law' means 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.' " *Smith v. Campbell*, 620 Fed. Appx. 734, 746 (11th Cir. 2015) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 1172 (2003) (quotation marks omitted)). "A state court's application of federal law is not unreasonable under § 2254(d)(1) 'so long as fairminded jurists could disagree on the correctness of the state court's decision.'" *Smith*, 620 Fed. Appx. at 746 (quoting *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 786 (2011) (quotation marks omitted)).

"As to § 2254(d)(2), 'a factual determination will not be overturned on factual grounds unless

objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Smith*, 620 Fed. Appx. at 746 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 1041 (2003)). "We may not characterize ... state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Smith*, 620 Fed. Appx. at 746 (quoting *Brumfield v. Cain*, 576 U.S. ——, ——, 135 S.Ct. 2269, 2277 (2015) (quotation marks omitted)). "The Supreme Court has found a state court's factual finding to be unreasonable where the record before the state court did not support the factual finding." *Smith*, 620 Fed. Appx. at 746-747 (quoting *Wiggins v. Smith*, 539 U.S. 510, 528–29, 123 S.Ct. 2527, 2539, 156 L.Ed.2d 471 (2003)).

In *Panetti*, the Supreme Court explained that "[u]nder AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a claim on the merits] ... resulted in a decision that ... involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." 551 U.S. 930 at 953.

First, Madison argues that because of his brain damage and resulting mental incompetency and dementia, he does not have an independent recollection of the offense for which he was convicted and does not have a rational understanding of why the State is attempting to execute him. Madison

argues that the state court failed to consider his dementia and resulting deficits in long-term memory and incorrectly found that he "failed to meet his burden of proving by a preponderance of the evidence that he '**suffers from mental illness** which deprives [Mr. Madison] of the mental capacity to rationally understand that he is being executed as a punishment for a crime."[5] (emphasis in original) Madison argues that "by failing to consider whether [he] was incapable of rationally understanding his execution because of his dementia and corresponding memory deficits, the state court unreasonably imposed a standard more restrictive than what the law clearly established by *Panetti* requires" and as a result "the state court's determination was both an unreasonable application of, and contrary to, clearly established federal law." (Doc. 2, p. 9-10)

Second, Madison argues that by limiting the analysis to whether he was incompetent because of "mental illness", the "state court failed to address crucial facts regarding his strokes and resulting dementia." Madison argues that this failure to address cannot be construed as a rejection of that evidence, and therefore, the decision was based on an

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[5] The court notes that the state court order indicates that the parties agreed to the burden of proof, as follows: "The parties agree that the burden of proof in this case is that the Petitioner must satisfy the trial court by a preponderance of the evidence, i.e., that it was more likely so than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is begin executed as a punishment for a crime." Madison v. State of Alabama, Civil Action 1985-001385.80 (Document 43, p. 5) (Circuit Court of Mobile County, Alabama, Apr. 29, 2016).

unreasonable determination of the facts in light of the evidence presented. (Doc. 2, p. 10)

Based upon the evidence cited in the state court's opinion, it is clear that the state court considered the evidence of Madison's recent diminished capacity and memory loss in reaching its determination that Madison had the requisite rational understanding that he was to be executed because of the murder he committed and that Madison understood that his execution was retribution for the crime. See *infra.* Thus, whether the court was required under *Ford* to consider mental issues that may fall outside of the clinical definition of mental illness but still affects rational thinking, is moot. The question then is whether the state court's determination was an unreasonable application of, and contrary to, clearly established federal law as enunciated in *Ford* and *Panetti.* In this regard the court agrees with the Respondent that the state court's decision was not an unreasonable application of, nor contrary to, clearly established federal law and adopts the Respondent's reasoning (as amended)[6] as follows:

First the state court correctly stated the law to be applied. The state court recognized the holding of *Ford* as being that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." (Vol. II, Tab R-12, at 3 (*quoting Ford*, 477 U.S. at 409-10)) The state court further identified the holding of *Panetti* as requiring an inquiry into whether a prisoner's mental illness deprives him of the mental capacity to understand that he is being executed as a punishment for a

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[6] To a substantial extent, the reasoning is adopted verbatim from Doc. 9, pp. 12-18.

crime, including whether the prisoner has a rational understanding of the State's rationale for his execution. (Vol. II, Tab R-12, at 4 (*citing Panetti*, 551 U.S. at 954, 959))

The state court recognized that Madison was entitled to a "fair hearing," including an opportunity to be heard, the opportunity to submit evidence and argument through counsel, and the right to present independent expert psychiatric evidence through the defense. (*Id.* at 3-4 (*quoting Panetti,* 551 U.S. at 949)) The state court further identified the question considered as whether "it was more likely than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is being executed as a punishment for a crime." (*Id.* at 4)

The state court considered the testimony of Dr. Kirkland, a court-appointed forensic psychologist, Dr. Goff, the defense-retained expert psychologist, and Warden Davenport, the Warden of Holman Prison (where Madison is housed). (*Id.* at 10) The state court also considered all of the exhibits offered by Madison, including medical records from the University of South Alabama Medical Center and Mobile Infirmary. (*Id.* at 10)

The state court found (1) that Madison failed to meet his burden of proof, (2) that the testimony of the court-appointed expert was due to be credited, (3) that Madison has a rational understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational understanding that the State is seeking retribution and that he will die when he is executed, and (4) that

the evidence does not support that Madison is delusional. (*Id.* at 10)

Thus, it is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution.[7] In finding that Madison

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[7] The trial court's focus on lack of evidence of delusion and psychosis was oriented toward making specific findings regarding Madison's allegations in the state court petition that he did suffer from delusions and psychosis. For example, Madison alleged in his petition that his mental illness was "marked by paranoid delusions and other disabilities" (Vol. I, Tab R-1, at 1), that an expert testified Madison had suffered "from a delusional disorder that has existed since he was an adolescent" (Vol. I, Tab R-1, at 5), that Madison had a "well-documented history of paranoia" of "a persecutory type" (Id.), and a claim that Madison had once exhibited delusional thinking including a belief that he was being used as a guinea pig in medical experiments (Id.) Madison further relied on testimony of another expert that he suffered "from paranoid illness of profound proportion," "a paranoid state; that is, a psychotic mental illness," and that Madison was expected to remain in "a psychotic condition" if he did not receive treatment [which he did not in prison]." (Id. at 5-6) Madison further relied upon an allegation of a previous defense expert that his "mental illness is chronic, and there is a more than ninety percent chance it will never go away." (Id. at 6) Madison's own legal team, although suffering from the fact they were lay witnesses, alleged that Madison was presently suffering from paranoid delusions. (Id.) Against these, and numerous other unfounded allegations of delusions and paranoia in the petition, the trial court prudently entered findings of fact.

was competent to be executed, the state court relied on the following facts:

> 1) Dr. Kirkland's finding that Madison did not suffer from paranoia, delusion, or psychosis;
>
> 2) Dr. Kirkland's finding that "even though Madison was functioning at the low average range of intellect, if not the low normal range, that 'while he may have suffered a significant decline post-stroke, his current functioning still would appear to result in a forensic finding that Madison understands the exact posture of his case at this point.'";
>
> 3) Dr. Kirkland's finding that Madison was able to discuss each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCrae's court;
>
> 4) Dr. Kirkland's finding that Madison appeared to understand his legal situation and is able to relate to his attorneys, including the ability to give details of the history of the case regarding appeals and his concerns;
>
> 5) Dr. Kirkland's testimony that Madison could remember specific things about the time of the offense as well as each trial, including the jury's advisory recommendation and the *Batson* challenge considered by this Court in 2013;

6) Dr. Goff's report that Madison recognized he was in prison for murder;

7) Dr. Goff's report that Madison felt his conviction was "unjust,";

8) Dr. Goff's report that Madison "understands the sentence, specifically the meaning of a death sentence. He understands the idea of being dead...He understands the procedures, or at least he seemed to.";

9) Dr. Goff's testimony that, "I think [Madison] understands that he—that [the State is] seeking retribution. I don't think he understands the act that he is being—that he is being punished for.";

10) Medical records showing that Madison's January 2016 hospitalization was based on symptoms unrelated to a "small acute CVA" but rather on synthetic marijuana and methamphetamine use.";

11) Medical records showing Madison was evaluated in January 2016 and "completed receptive language task of answering complex yes/no questions and following multi-step commands with 100% [accuracy]. Expressive language tasks of naming items was completed with 100% [accuracy], automatic with a 100% [accuracy].";

12) Medical records from Madison's January 2016 hospitalization indicating that upon arrival at the hospital Madison "had an altered mental status, but apparently now is back to baseline.";

> 13) Medical records from May 2015 showing Madison was "awake/alert. Oriented to person, place and situation, still confused about time.";
>
> 14) Warden Davenport's testimony that Madison responded with "My lawyers are supposed to be handling that," in response to the reading of the death warrant; and
>
> 15) Warden Davenport's testimony that Madison was not receiving mental health treatment from the Alabama Department of Corrections.

(Vol. II, Tab R-12, at 5-9) Based on this evidence, the state court found that Madison had not carried his burden of proof on the issue of his competency. (Vol. II, Tab R-12, at 10) More specifically, the state court found that Madison possessed a rational understanding that he was being executed for the murder he committed and that his sentence was in retribution for the crime. (*Id.*)

Madison has attempted to convince this court that it should credit testimony that was more favorable to Madison's position and find the state court acted unreasonably in doing otherwise. However, that is not the role of this court. *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010) ("A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.")). The court may only examine the evidence to determine whether the state court's conclusions were unreasonable in light of the evidence that the state

court reasonably found to be credible. In that regard, it was not unreasonable for the state court to rely on the opinions of Dr. Kirkland, which was supported by other evidence of record.

Madison also claims that the state court's factual findings constituted an unreasonable determination of the facts because the state court failed "to even consider evidence of dementia, and its impact on Mr. Madison's cognitive functioning and understanding of the proceedings." As previously stated, this is incorrect. In finding that Madison failed to prove by a preponderance of the evidence that he was incompetent to be executed, the state court relied on Madison's ability to talk with Dr. Kirkland about "very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial, as well as the outcome with regard to judicial override and Batson challenge" and the death penalty versus life without parole. (Vol. II, Tab R-12, at 5-6) Finally, the state court also relied on Dr. Goff,[8] who testified that despite any dementia, Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for[.]" (Vol. II, Tab R-12, at 7)

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[8] To the extent the two expert's opinions differed on the issue of whether Madison's dementia affected his competency to be executed, the state court's election to rely on Dr. Kirkland's opinion rather than Dr. Goff's opinion is entitled to great deference and will not be disturbed unless determined to be unreasonable. See, e.g., Panetti v. Stephens, 727 F.3d 398, 410-11 (5th Cir. 2013) (noting "[t]he [district] court's careful draw on the experts' conflicting testimony is entitled to 'great deference' from this Court" and that this "is probably sufficient by itself to sustain the district court's judgment under a clear-error standard.").

The state court also took notice of Madison's confusion and mental status at the time of his hospitalization in January 2016 (Vol. II, Tab R-12, at 7), but then went on to note that Madison was "alert, well appearing, and in not distress" and "alter and oriented X 3" prior to his discharge (*Id.* at 8) The state court further relied on a consulting physician's notation that Madison had returned "back to baseline" by the time he was discharged from the hospital in January 2016. (*Id.* at 8) Thus, it is evident that the state court did consider the effects on Madison's dementia on his competency to be executed.

In sum, having considered the evidence deduced at the hearing, the court finds that the determination of facts by the state court was not an unreasonable determination of the facts. Also the state court's determination was neither an unreasonable application of, nor contrary to, clearly established federal law.

Ultimately the question presented by the first claim in Madison's habeas petition is whether "some fair minded jurists could agree" with the circuit court's ultimate conclusion that Madison is competent to be executed given the ultimate opinion of Dr. Kirkland (which the trial court fully credited) and Dr. Goff (of which the trial court partially credited), the medical records showing that Madison had returned to "baseline" before his discharge from the hospital in January 2016, and Madison's response to Warden Davenport's reading of the death warrant. *See Ferguson*, 716 F.3d at 1340. Because the answer to this question is "yes, fair minded

jurists could agree with that conclusion," Madison is not entitled to relief. *Id.* at 1340-41.

V. Conclusion

The court finds that the state court correctly applied *Ford* and *Panetti* and that the decision was not based upon an unreasonable application of, or contrary to, clearly established federal law or an unreasonable determination of the facts in light of the evidence presented to the state court. Accordingly, for the reasons set forth herein, Madison's petition for writ of habeas corpus is DENIED, his motion for stay of execution is DENIED, Respondent's motion to dismiss Claim Two (*Atkins* claim) pursuant to 28 U.S.C. § 2244(b) and for failure to exhaust is GRANTED, and Respondent's motion to dismiss for lack of exhaustion as to Claim One (*Ford* claim) is DENIED.

VI. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the court must determine whether Madison is entitled to a certificate of appealability. 28 U.S.C. foll. § 2254, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute states that an applicant is entitled to appeal a district court's denial of a habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2243(c)(2).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000) or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003) (internal quotations omitted). Madison has not met his burden to show that reasonable jurists would find debatable his constitutional claims or that the issues he presented were adequate to deserve further review. Therefore, he is not entitled to a Certificate of Appealability.

DONE and **ORDERED** this 10th day of May 2016.

s / Kristi K DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

DOCUMENT 43

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

VERNON MADISON

Petitioner,

V. Case No. CC-1985-001385.80

STATE OF ALABAMA

Respondent.

ORDER

This matter is before this Court on a Petition filed on behalf of Vernon Madison, requesting a suspension of Mr. Madison's death sentence pursuant to Alabama Code Section 15-16-23, Code of Alabama 1975. The sole contention made by Vernon Madison in the Petition is that he is incompetent to be executed.

PROCEDURAL HISTORY

Mr. Madison underwent three separate trials in the Circuit Court of Mobile County, Alabama, before the Honorable Ferrill D. McRae. At the conclusion of each trial, Judge McRae sentenced Madison to death. Madison's third trial was held in April of 1994, and Madison was sentenced to death. His case was affirmed on appeal, Madison v. State, 718 So.2d 90 (Ala. Crim. App. 1997); Ex parte Madison, 718 So.2d 104 (Ala. Crim. App. 1998), and the United States Supreme Court denied certiorari review. Madison v. Alabama, 525 US 1006 (1998).

Madison filed a Rule 32 post conviction petition pursuant to the Alabama Rules of Criminal Procedure. This Rule 32 Petition was dismissed by the Alabama Court of Criminal Appeals without a hearing. Madison v. State, 99 So.2d 561 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison filed his first petition and only petition for Federal habeas corpus relief pursuant to 28 U.S.C. Section 2254. Relief was denied by the District Court, but the Court of Appeals for the Eleventh Circuit reversed the Court's denial and remanded with instructions. Madison v. Commissioner's, Ala. Dept. Of Corr., 677 F. 3rd 1333 (11th Cir. 2012). In 2013, the District Court again denied Mr. Madison's petition for habeas corpus relief and that denial was affirmed by the Court of Appeals of the Eleventh Circuit in 2014, Madison v. Commissioner's Ala. Dept. Of Corr., 761 F. 3rd 1240 (11th Cir. 2014). Certiorari review was denied by the United State Supreme Court in March of 2015. Madison v. Thomas, 135 S.Ct. 1562 (2015). A petition for re-hearing was filed by Madison and that was denied by the United States Supreme Court on May 18, 2015. Madison v. Thomas, 135 S.Ct. 2346 (2015).

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. Madison's petition for suspension of the death sentence pursuant to Section 15-16-23 Code of Alabama 1975, was filed on February 12, 2016. On February 18, 2016, the State of Alabama filed a motion to dismiss Madison's petition. The State contended that Section 15-16-23 had been displaced by the Alabama Supreme Court's

Rule-making authority, i.e. Rule 32, and cannot provide the relief that was requested. Initially the Court granted the motion to dismiss and also dismissed the petition filed on behalf of Madison, stating that since the Alabama Supreme Court had now issued a death warrant as of March 7, 2016, setting an execution date of May 12, 2016, the matter should be pursued in the County where the Defendant is housed as a petitioner for habeas corpus. A motion to reconsider was filed by Madison and granted on March 14, 2016.

The undersigned, who is the successor to the Honorable Ferrill D. McRae, set the matter for a competency hearing. The hearing date was set for April 14, 2016. This Court appointed Karl Kirkland, Ph.D., for an expedited examination as to Madison's competency to be executed.

THE HEARING

Dr. Kirkland examined Madison on March 31, 2016, and issued a written report on April 6, 2016. On April 7, 2016, Madison's retained expert, John R. Goff, Ph.D., interviewed Madison at Holman Prison. Dr. Goff issued a written report on April 12, 2016. Both Dr. Kirkland and Dr. Goff appeared at the hearing on April 14, 2016, in the Circuit Court of Mobile County, Alabama, and both were examined and cross-examined by the attorneys.

Section 15-16-23 Code of Alabama, provides:

> "If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall

> forthwith enter an order in the trial court suspending the execution of the sentence at the time fixed in the order; . . . ."

Thus, this Court is granted jurisdiction to hear and determine at any time before the execution, whether Madison is incompetent to be executed. This procedure is also in keeping with Ford v. Wainwright, 477 U.S. 399 (June 26, 1986), and Panetti v. Quarterman, 551 U.S. 930 (June 28, 2007). Both Ford and Panetti basically hold that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." See Ford 477 U.S. 409-410.

Ford is a four-justice plurality, with Justice Powell concurring, but with a narrower holding on the issue in which he concurs. Thus Justice Powell's opinion controls on that issue. There were several observations made in the Ford main opinion, such as on the issue of the trial court deciding competency, as follows:

> " . . . Indeed, a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess, however conscientious.'" (Cites omitted.) 477 U.S. at 412

Also the four judge plurality noted:

> "The minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a

claim before it is rejected." (Cites omitted.) 477 U.S. At 414. (internal cite omitted)

Justice Powell's opinion in Ford set out the minimum relevant procedures to comply with due process. They are as follows:

> "1. A prisoner seeking a stay of execution must make "a substantial threshold showing of insanity." (This Court has determined that the petition and the affidavits attached to the petition has crossed that substantial threshold.) 551 U.S. at 949.
>
> 2. Once that is done, procedural due process requires a 'fair hearing' in accord with fundamental fairness, i.e. 'a prisoner must be accorded an opportunity to be heard.
>
> 3. The basic requirements for the hearing 'include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." 551 U.S. at 949.

The issue in Panetti, supra, aside from the due process requirements set out above, was,

> "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the mental capacity to understand that [he] is being executed as a punishment for a crime." 551 at 954.

* * *

"A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. Ford does not foreclose inquiry into the latter." 551 at 959.

BURDEN OF PROOF

The parties agree that the burden of proof in this case is that the Petitioner must satisfy the trial court by a preponderance of the evidence, i.e., that it was more likely so than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is being executed as a punishment for a crime.

TESTIMONY AND EXHIBITS ADMITTED AT THE HEARING

This Court followed its usual procedure for requesting a psychological examination of someone who raises a mental incompetency defense as to whether they could stand trial or whether they were mentally competent at the time of an alleged commission of the act. This is done by appointing the psychologist who has contracted with the State of Alabama to make an initial examination of the defendant. In this case, it was Dr. Kirkland who examined Madison and rendered a written report which was marked into evidence as Court's Exhibit "1". This Court called Dr. Kirkland to the witness stand and briefly examined Dr. Kirkland before turning Dr. Kirkland over to cross examination by the prisoner's counsel and follow up examination by counsel for the State of Alabama.

KARL KIRKLAND, Ph. D.

Dr. Kirkland in his exam found no evidence of paranoia or delusion at the time of his examine, on March 31, 2016. He also found that there was no psychosis present (Court's Exhibit "1" page 9 - Thought Processes), Dr. Kirkland also noted that even though Madison was functioning at the low average range of intellect, if not the low normal range, that "while he may have suffered a significant decline post-stroke, his current functioning still would appear to result in a forensic finding that Madison understands the exact posture of his case at this point. [Madison] was able to discuss each appeal and he marveled each time with the fact that the whole process would end up being back in Judge McCray's (sic) court, * * * he still maintains there is no question in his mind that the trial court judge, who he reports was friends with the victim's family, was going to see him to death, regardless what he had to do to get there. This did not seem delusional at all. He just seems to believe that this was the case." Court's Exhibit "1" page 9 (Intellectual Estimate).

Dr. Kirkland concluded that Madison "appears to understand his legal situation and is able to relate to his attorneys. He was able to give details of the history of his case regarding appeals and was able to discuss his concerns." Court's Exhibit "1" page 11 (Summary and Recommendation).

At the hearing, Dr. Kirkland was asked whether he had an opinion as to whether Mr. Madison understood that the State is seeking retribution against him for an act he committed in the past. Just before that question was asked, Dr. Kirkland stated:

> "There's no question that Mr, Madison has deteriorated a great deal, but he was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial, as well as the outcome with regard to judicial override and Batson challenge." (transcript p. 68)

Further according to Dr. Kirkland, Madison talked specifically about the death sentence verses life without and discussed the original trial and the first re-trial.

JOHN R. GOFF, Ph.D.

Dr. Gaff has, as Dr. Kirkland, reviewed numerous medical records, including the January 5, 2016, admission which carried a diagnosis of methamphetamine abuse, as well as acute encephalopathy and the history of CVA with hearing and vision changes. After giving a number of tests to Mr. Madison, Dr. Goff interviewed him concerning his understanding of the reasons for the punishment involved. Dr. Goff noted in his written report:

> "In this case this man said that the reason he was in prison was because of 'murder', but he seemed unable to tell me who the victim was except that he had been told that the victim was someone who knew the judge very well. He appeared to be unable to tell me the sequence of events from the offense to his arrest to the trial or any of those details.
>
> * * *

> In regard to the time frame he told me that he had been in prison for 30 years. When asked where he was convicted from he said 'must have been Mobile' although he seemed unsure. Again, he was able to tell me that the crime 'must have been a murder'. He could not identify the name of the victim. As Dr. Kirkland points out, he does feel that his conviction was unjust and he did mention the fact that he had been told that he had three trials and he did indicate that the judge had overridden the jury. I asked him how he knew that and he said that his relatives had told him that.
>
> He understands the sentence, specifically the meaning of a death sentence. He understands the idea of being dead . . He understood the procedures, or at least he seemed to. In terms of the reasoning behind the execution, he indicates that he does not believe that he ever killed anybody, because, 'I never went around killing folks.' (Goff written report p. 7)

Dr. Goff seemed to put particular emphasis on the January, 2016, 'thalamic' stroke, and believes this may be the cause for his difficulties with memory. According to Dr. Goff, while in the hospital Madison was disoriented, amnesic, and also indicated that he cannot remember numerous events that have occurred over the past thirty years or more. Dr Goff believes that Madison is currently functioning in the border-line range of psychometric intelligence, and

believes that a significant decline has occurred over the years, as would be expected."

Dr. Goff indicated also:

> "As to the specific competency requirements at issue here, this man does have a significant cognitive deficit. He is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for, though, he does not appear to have independent recollections of the proceedings themselves or the facts of the case or the identity of the individual who is the victim, (Goff written report p. 8)

Dr. Goff was asked on the witness stand:

> "Does Mr. Madison understand that the State is seeking retribution against him for an act that he committed in the past?
>
> **The Witness:** I think he understands that he - that they're seeking retribution. I don't think he understands the act that he is being - - that he is being punished for. (transcript p. 65)

RECENT STROKES

In his discharge summary from the Mobile Infirmary on January 7, 2016, (Petitioner's Exhibit "10" page 010), James N. Byrd, M.D., noted:

> "Neurology was consulted, and an MRI was obtained, showing a very small acute CVA. This, however, does not account for his symptoms (Right-sided CVA and right-

> sided weakness), Synthetic Marijuana and Methamphetamine use, however, is more clinically consistent with his symptoms, especially with the quick resolution."

Madison was in Mobile Infirmary from January 5, 2016 to January 7, 2016. On admission, his history and physical indicated:

> "Patient is confused and has difficulty hearing questions and his answers are not appropriate at times," (Plaintiffs Exhibit "10" Page 025)

Madison was assessed by Jennifer Jones, a Nurse Practitioner, who noted that Madison had "mild to moderate aphasia; some obvious loss of fluency or facility of comprehension without significant limitation on ideas expressed or form of expression." (Plaintiffs Exhibit "10" Page 053)

Also Madison was seen by a speech and language pathologist who noticed that Madison "completed receptive language task of answering complex yes/no questions and following multi-step commands with 100% ACC. Expressive language tasks of naming items was completed with 100% ACC, automatic with a 100% ACC. Response speech tasks of answering "wh" questions equal 80% ACC, and sentence completion tasks equal 60% ACC, and word fluency 80% ACC. All ST Goals from initial evaluation have been met. The patient presents with mild expressive language deficits. Receptive language, is "WFL" [within functional limits], (Plaintiffs Exhibit "10" Page 057).

Also Dr. Byrd had neurology consulted. That note reveals "neurology was consulted, and an MRI was

obtained, showing a very small acute CVA." (Plaintiff's Exhibit "10" Page 060).

Caesar Agagan, M.D., saw Madison on January 6, 2016. In his review of systems, Dr. Agagan noted that Madison was alert, well appearing , and in no distress, and "alert and oriented X 3". (Plaintiffs Exhibit "10" Page 063).

However, Physical Therapist Elizabeth Baugh noted on January 6, 2016, that Madison was not oriented to place, not oriented to situation, confused-memory deficits and follows 1-step commands. (See Plaintiffs Exhibit "10" Page 070). However, see also, Speech Therapy Assessment (Plaintiffs Exhibit "10" Page 286 - 287). And see Speech Therapy Evaluation (Petitioner's Exhibit "10": Page 291 - 292).

Finally consulting physician Dr. Agagan's consult concerning history of present illness noted:

> "Mr. Madison is a 65 year old gentleman inmate who is on death row, was found yesterday per documentation unresponsive for about 30 minutes with incontinence. He has been brought here for evaluation and management. Initially he had an altered mental status, but apparently now is back to baseline." (Petitioner's Exhibit "10" Page 309).

Madison was admitted to the University of South Alabama Medical Center on May 7, 2015. At that time he was found to have had bilateral cerebellar occipital infarctions. (Petitioner's Exhibit "9" Page 140).

Madison was discharged from USA Medical Center on May 8, 2015, and the nurse's progress note states as follows:

> "MD Liu. Spoke to MD Hood at Holman about PT's current condition and vitals, Pt awake/alert. Oriented to person, place and situation, still confused about time. VSS. P. D/C Holman in care of MD Hood." (Petitioner's Exhibit "9" ND0010.

WARDEN CARTER FITZGERALD DAVENPORT

The State called Mr. Davenport who is the Warden of W.C. Holman Correctional Facility in Atmore, Alabama. Warden Davenport served the death warrant issued by the State of Alabama Supreme Court on Mr. Madison. When asked how the death warrant was served, Warden Davenport said that when he received the warrant, he had his Captain over the death row section of the prison have Mr. Madison brought into his office. At that time the Captain was present and so was Mr. Madison. The Warden told Madison what he had for him, made a copy for him, and informed him by reading the notice and asked for a signature and gave him a copy of the notice. When asked whether Madison said anything during this, the Warden answered, "he did" and that Madison stated "my lawyers are supposed to be handling that." The Warden also indicated that inmates at Holman are assigned mental health codes depending upon whether they receive psychiatric or mental health care. The Warden had had that code checked in late February or early March, 2016, and that Madison

had a "mental health code of 0", meaning he was not receiving treatment for a mental health condition.

VERNON MADISON

Madison was present at the hearing, although he was not called to testify and this Court asked no questions of Vernon Madison. It was difficult to tell if Madison was following all of the testimony or not. Madison appeared to be a physically ill individual, confined to a wheelchair, wearing a neck brace, which was believed to be used for support for his neck because of cervical problems.

CONCLUSION

Based upon the testimony of Dr. Kirkland and his clinical evaluation report admitted into evidence, the testimony of Dr. Goff and his clinical evaluation report admitted into evidence, the testimony of Warden Davenport, all of the Petitioner's Exhibits admitted into evidence, including the records from the University of South Alabama Medical Center and Mobile Infirmary, and argument of counsel, this Court concludes that the Petitioner has not carried his burden by a preponderance of the evidence, that it is more likely than not, that he, Madison, does not rationally understand the punishment he is about to suffer and why he is about to suffer it. This Court accepts the testimony of Dr. Kirkland as to the understanding Madison has concerning the situation. This Court specifically finds that Madison has a rationale understanding, as required by Panetti, that he is going to be executed because of the murder he committed and a rationale understanding that the State is seeking retribution and that he will die when he is executed. Further,

the evidence does not support that Mr. Madison is delusional.

IT IS ORDERED, ADJUDGED and DECREED that the Petition for Suspension of Mr. Madison's Death Sentence Pursuant to Alabama Code 15-16-23 is **DENIED**.

DONE this 29th day of April, 2016.

s/ Robert H. Smith
ROBERT H. SMITH
CIRCUIT COURT JUDGE

Case: 16-12279 Date Filed: 05/04/2017 Page: 1 of 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN, and JORDAN,Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

ORD-42

(ORDER LIST: 578 U.S.)

THURSDAY, MAY 12, 2016

ORDER IN PENDING CASE

15A1175 DUNN, COMM'R, AL DOC V. MADISON, VERNON

The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on May 12, 2016, presented to Justice Thomas and by him referred to the Court, is denied.

The Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito would grant the application to vacate the stay of execution.

Case: 16-12279 Date Filed: 05/12/2016 Page: 1 of 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

D.C. Docket No. 1:16-cv-00191-KD-M

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

BY THE COURT:

Petitioner Vernon Madison is an Alabama prisoner scheduled to be executed on May 12, 2016. He has filed a 28 U.S.C. § 2254 petition contending that he is mentally incompetent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), and Panetti v. Quarterman, 551 U.S. 930, 127

S. Ct. 2842 (2007). The district court found that Madison properly filed his Ford claim in federal court but denied the claim on the merits. The district court found that Madison had exhausted his Ford claim in state court as required by 28 U.S.C. § 2254(b)(1). It also noted that Madison's Ford claim was not barred as "second or successive" under 28 U.S.C. § 2244(b).

Madison moves for a certificate of appealability ("COA") so that he may appeal the denial of his § 2254 petition. He also seeks a stay of his execution pending appeal.

This Court may issue a COA from the denial of a § 2254 petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

The Supreme Court has held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Ford, 477 U.S. at 409–10, 106 S. Ct. at 2602. Then in Panetti the Court clarified that the prisoner must have "a rational understanding of the reason for the execution." 551 U.S. at 958, 127 S. Ct. at 2861. Madison alleges that as result of a series of strokes and other serious medical conditions, he suffers from vascular dementia, which has resulted in significant memory impairment, a decline in cognitive functioning, and ultimately an inability to rationally

understand why the State of Alabama is seeking to execute him. An Alabama trial court denied this claim. Madison did not appeal this decision because, as the Alabama trial court and the district court found, Alabama state law insulates the trial court's competency decision from review by any other Alabama court. See Ala. Code §15-16-23. Madison argues that the state court's decision that he is competent to be executed was contrary to or involved an unreasonable application of Panetti and Ford. Madison also argues that the state court's decision was based on an unreasonable determination of the facts because it failed to consider evidence of his dementia and related impairments.

The Supreme Court has observed that a Ford claim is unique from other constitutional claims that arise in capital cases because it becomes ripe for adjudication only when the petitioner's execution is imminent. See Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45, 118 S. Ct. 1618, 1622 (1998); see also Panetti, 551 U.S. at 947, 127 S. Ct. at 2855 ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). This is therefore the first time that any state or federal court has had the opportunity to consider Madison's claim that his execution is prohibited by the Eighth Amendment. This claim could not have been raised before Madison's execution became imminent, and only the Alabama trial court and the district court have reviewed Madison's claim.

Pursuant to Miller-El, Madison has satisfied § 2253(c)(2)'s standard. Madison's motion for COA is **GRANTED** as to the following issues:

> (1) Whether the state court's decision that Madison is competent to be executed is contrary to or involves an unreasonable application of clearly established federal law.
>
> (2) Whether the state court's decision that Madison is competent to be executed was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"If a certificate of appealability is granted by the district court or by this court, the panel may grant a temporary stay pending consideration of the merits of the appeal if necessary to prevent mooting the appeal." 11th Cir. R. 22-4(a)(7); see also Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330, 1344 (11th Cir. 2013) (granting temporary stay of execution under Rule 22-4(a)(7), denying state's motion to vacate the stay, and ultimately affirming the district court's denial of habeas relief after hearing oral argument on the merits of prisoner's Ford claim). Madison's death will render his appeal moot. The Court therefore **GRANTS** Madison's Motion for Stay of Execution.

The Court directs the parties to brief the merits of the issues identified in the COA, pursuant to the following schedule: Petitioner shall file a brief on the merits by May 27, 2016. Respondent shall have until June 10, 2016, to file a response brief. Petitioner shall then have until June 17, 2016, to file a reply brief. The parties are directed to file the briefs electronically and to serve the briefs to opposing counsel electronically at the same time. Oral

argument shall take place in Atlanta on June 23, 2016, at 9:00 a.m. EST. Counsel shall be given 30 minutes per side.

IT IS SO ORDERED.